TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 245.

HENRY L. WARD, TREASURER, PETITIONER,

vs.

EDWARD JOSLIN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR CERTIORARI FILED FEBRUARY 1, 1901.
CERTIORARI AND RETURN FILED MARCH 22, 1901.

(18,043.)

(18,043.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No 245.

HENRY L. WARD, TREASURER, PETITIONER,

vs.

EDWARD JOSLIN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	1
Writ of error to United States circuit court for district of New Hampshire	1	1
Return on writ of error	2	2
Transcript from United States circuit court for district of New Hampshire	3	3
Court and title of case	3	3
Writ and marshal's return thereon	3	3
Declaration	5	4
Defendant's plea and brief statement	5	5
Amendment to defendant's brief statement	5	5
Jury empanelled	6	5
Second amendment to defendant's brief statement	6	5
Stipulation waiving jury trial	6	5
Findings of fact	7	6
Motion for new trial	9	7
Plaintiff's bill of exceptions	10	8
Judgment	14	11
Petition for writ of error	14	12
Assignment of errors	16	13
Deposit in lieu of bond	20	16
Opinion and rulings of law	20	16

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 9, 1901.

	Original.	Print
Certificate of clerk	23	18
Citation and acknowledgment of service thereof	23	19
Exhibit 1, annexed to and made a part of plaintiff's bill of exceptions	25	20
Declaration	29	20
Defendant's plea and brief statement	36	26
Amendment to defendant's brief statement	36	27
Second amendment to defendant's brief statement	37	27
Evidence	38	28
Charter of Western I., L. & T. Co.	38	28
Deposition of James A. Troutman	39	29
Exhibit A—By-laws of the Western I., L. & T. Co.	50	38
Minutes of meetings	53	41
Exhibit B—Extract from stockholders' book	60	47
Exhibit E—Trial balance	60	47
Defendant's Exhibit I—Certificate of stock No. 125	61	49
Exhibit F—Certificate of stock No. 37	62	49
G—Stub of certificate 125	62	50
H—Stub of certificate 37	62	50
Deposition of Edward Joslin	63	51
Deposition of Frederick E. Kingsbury	73	61
Letters, Troutman to Joslin	77	64
Letter, Joslin to Washburn, cashier	78	65
Record of judgment in district court of Smith county, Kansas, in Ward, treasurer, *vs.* Hite *et al.*	79	66
Caption	79	66
Petition	79	66
Præcipe for summons	86	73
Exhibit A—Note	87	73
Exhibits B and C—Notes	87	74
Exhibit D—Trust deed	88	74
Summons and return	91	78
Summons and return	93	79
Motion to make petition more certain	94	80
Statement as to omissions from record	94	80
Judgment	94	81
Execution	96	82
Sheriff's return	97	83
Clerk's certificate	98	84
Judge's certificate	101	86
Index to Exhibit No. 1	103	86
Opinion	107	87
Judgment	119	94
Petition for rehearing	121	94
Order denying rehearing	129	98
Order staying mandate	129	98
Clerk's certificate	130	98
Writ of certiorari	131	99
Return on writ of certiorari	132	100
Stipulation as to return	133	100

a United States Circuit Court of Appeals for the First Circuit, October Term, 1900.

H. L. WARD, Treasurer, Plaintiff, Plaintiff in Error,
v.
EDWARD JOSLIN, Defendant, Defendant in Error. } No. 340.

Error to the circuit court of the United States for the district of New Hampshire; judgment in circuit court (Aldrich, J.), May 7, 1900.

Certified Copy of Record and All Proceedings in said Cause to and Including January 15, 1901.

b United States Circuit Court of Appeals for the First Circuit, October Term, 1899.

H. L. WARD, Treasurer, Plaintiff, Plaintiff in Error,
v.
EDWARD JOSLIN, Defendant, Defendant in Error. } No. 340.

Error to the circuit court of the United States for the district of New Hampshire; judgment in circuit court (Aldrich, J.), May 7, 1900.

Record.

William Reed Bigelow, E. L. Waterman, Pulsifer & Alexander, for plaintiff in error.
John S. H. Frink, for defendant in error.

Boston:
Printed under direction of the clerk.
1900.

1 United States Circuit Court of Appeals for the First Circuit, October Term, 1899.

H. L. WARD, Treasurer, Plaintiff, Plaintiff in Error,
v.
EDWARD JOSLIN, Defendant, Defendant in Error. } No. 340.

Writ of Error.

[L. S.] UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of New Hampshire, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between H. L. Ward, treasurer, now and for more than ten years last past an inhabitant and citizen of Burlington, in the State and district of Vermont, as plaintiff, and Ed-

ward Joslin, now and for more than ten years last past an inhabitant and citizen of Keene, in the State and district of New Hampshire, banker, as defendant, a manifest error hath happened, to the great damage of the said H. L. Ward, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the first circuit, together with this writ, so that you have the same at the city of Boston,
2 Massachusetts, on the fifteenth day of June next, in the said circuit court of appeals; that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the sixteenth day of May, in the year of our Lord one thousand nine hundred.

FREMONT E. SHURTLEFF,
Clerk of the Circuit Court of the United States,
District of New Hampshire.

Allowed by—
EDGAR ALDRICH,
Presiding Judge.

Return of Circuit Court on Writ of Error.

Circuit Court of the United States, District of New Hamsphire, *ss:*

And now, here, the judges of the circuit court of the United States, in and for the district of New Hampshire, make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States circuit court of appeals for the first circuit, as within commanded.

In testimony whereof, I, Fremont E. Shurtleff, clerk of said circuit court of the United States, in and for the district of New Hampshire, have hereto set my hand and the seal of said court this seventh day of June, A. D. 1900.

[SEAL.] FREMONT E. SHURTLEFF, *Clerk.*

3 *Transcript of Record of Circuit Court.*

(Filed in circuit court of appeals June 11, 1900.)

Circuit Court of the United States, District of New Hampshire.

At the circuit court of the United States for the first circuit, begun and holden at Concord within and for the district of New Hamp-

shire, on the eighth day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: Honorable Edgar Aldrich, district judge.

H. L. WARD, Treasurer, Plaintiff,
v.
EDWARD JOSLIN, Defendant. } No. 428, Law Docket.

H. L. Ward, treasurer, now and for more than ten years last past an inhabitant and citizen of Burlington, in the State and district of Vermont, against Edward Joslin, now and for more than ten years last past an inhabitant and citizen of Keene, in the district of New Hampshire.

Writ.

(Filed May 8, 1897.)

UNITED STATES OF AMERICA,
New Hampshire District, } *ss:*

[L. S.] The President of the United States of America to the marshal of our district of New Hampshire or his deputy, Greeting:

We command you to attach the goods or estate of Edward Joslin, now and for more than ten years last past an inhabitant and citizen of Keene, in the State and district of New Hampshire, banker, to the value of seven thousand dollars, and to summon the said Edward Joslin (if he may be found in your district) to appear before our judges of our circuit court, next to be holden at Portsmouth,
4 within and for our said district of New Hampshire, on the eighth day of May next, then and there in our said court to answer unto H. L. Ward, treasurer, now and for more than ten years last past an inhabitant and citizen of Burlington, in the State and district of Vermont,

In a plea of debt, etc.

(Memorandum.—Declaration as appears in plaintiff's bill of exceptions, Exhibit 1, page 3 (29), is here inserted. Fremont E. Shurtleff, clerk.)

To the damage of the said H. L. Ward, treasurer (as he says) the sum of seven thousand dollars, which shall then and there be made to appear, with other due damages.

And have you there this writ, with your doings therein.

Witness, Melville W. Fuller, Esquire, at Concord, the fifteenth day of December, anno Domini 1896.

FREMONT E. SHURTLEFF, *Clerk.*

Officer's Returns on Writ.

DISTRICT OF NEW HAMPSHIRE, *ss:*

DECEMBER 15, 1896.

I attached all the lands and tenements in the city of Keene in which the within-named defendant has any right, title, interest or

estate, by leaving at the office of J. P. Wellman, the city clerk of said Keene, a true and attested copy of this writ, and of this my return, indorsed thereon, at (8) eight of the clock in the p. m. of said day.

FRANK E. HORNER,
Deputy United States Marshal.

Fees.

Service	$2 00
Paid clerk	20
Copy	1 65
Travel to clerk's (office) (dwelling-house)	06
	$3 91

DISTRICT OF NEW HAMPSHIRE, *ss:*

DECEMBER 15, 1896.

I then, at eight o'clock in the p. m. attached the money, goods, chattels, rights and credits of the within-named defendant, and summoned him, as within commanded, by (leaving at his last and usual place of abode) a true and attested copy of this writ, and on the fifteenth day of December, 1896.

F. E. HORNER,
Deputy United States Marshal.

Fees.

1 service	$2 00
1 copy	1 65
64 m. travel	3 84
	$7 49

Declaration.

(Filed May 8, 1897.)

(Memorandum.—Declaration as appears in plaintiff's bill of exceptions, Exhibit 1, page 3 (29), is here inserted. Fremont E. Shurtleff, clerk.)

This cause was entered at the May term, 1897, when and where the parties appeared by their respective attorneys, and thence the same was continued from term to term to the October term, 1897, when on, to wit, the twenty-sixth day of December, A. D. 1897, the following plea and brief statement of the defendant was filed.

Defendant's Plea and Brief Statement.

(Filed December 26, 1897.)

(Memorandum.—Defendant's plea and brief statement, as appears in plaintiff's bill of exceptions, Exhibit 1, page 10 (36), is here inserted, Fremont E. Shurtleff, clerk.)

The cause was thence continued from term to term to the May term, A. D. 1899, when on, to wit, the seventeenth day of July, A. D. 1899, the defendant filed the following amendment to his brief statement.

Amendment to Defendant's Brief Statement.

(Filed July 17, 1899.)

(Memorandum.—Amendment to defendant's brief statement, as appears in plaintiff's bill of exceptions, Exhibit 1, page 11 (37) is here inserted. Fremont E. Shurtleff, clerk.)

6 And thereafter on, to wit, the fourth day of September, A. D. 1899, a jury of twelve men, duly qualified, was empanelled and sworn to try the issues according to the law and the evidence, and evidence was introduced before said jury.

And thereafter on, to wit, said fourth day of September, the foregoing amendment to defendant's brief statement, filed July 17, 1899, was allowed by the court.

And thereafter on, to wit, the fifth day of September, A. D. 1899, the defendant filed the following amendment to his brief statement, which said amendment was, on said fifth day of September, allowed by the court.

Amendment to Defendant's Brief Statement.

(Filed and allowed September 5, 1899.)

(Memorandum.—Amendment to defendant's brief statement, as appears in plaintiff's bill of exceptions, Exhibit 1, page 10 (36), is here inserted. Fremont E. Shurtleff, clerk.)

And thereafter on, to wit, said fifth day of September, by agreement of parties, the cause was withdrawn from the jury, the following stipulation being filed:—

Stipulation Waiving Jury Trial.

(Filed September 5, 1899.)

At the conclusion of the evidence, it is agreed that the above-entitled cause shall be heard by the court, and jury trial therein is expressly waived by the parties, but without waiving any exceptions taken in the case.

J. S. H. FRINK, *For Defendant.*
E. L. WATERMAN & MARTIN,
For Plaintiff.

This cause was then continued from term to term to the present term, when, after the parties, on the seventh day of February, A. D

1900, had been fully heard by the court, the Honorable Edgar
7 Aldrich, district judge, presiding, on, to wit, the eighth day of March, A. D. 1900, the following findings of fact are entered:—

Findings of Fact.

(Filed March 8, 1900.)

ALDRICH, *J.:*

Sitting as judge and jury in this case, I first make my findings of fact, and then rule upon questions of law.

I find as a matter of fact that the defendant, on June 9, 1894, owned 100 shares, of the par value of $50 each, in the Western Investment Loan and Trust Company, a Kansas corporation; that on that day the trust company, as a matter of fact, was insolvent; and that the defendant, suspecting the financial condition of the trust company was unsound, and apprehending litigation, and having in mind the stockholders' statutory liability, without consideration transferred the stock to Frederick E. Kingsbury, his grandson, who was a young man, but not responsible in the sense of having any considerable, if any, attachable property. And so far as it is a question of fact, I find that the transfer was not such a *bona fide* transfer as to relieve the defendant from his individual liability as a stockholder if he were otherwise liable. I also find that a new certificate was issued to Kingsbury, and that the transfer of such stock was noted on the stub of the certificate book, but that such transfer was not noted on the transfer book provided by the company for such purpose, and that the neglect to so enter it was the neglect of the bank officers and not of the defendant.

I find as matter of fact, upon the evidence contained in the record and upon the arguments, that Ward's claim against the trust company was upon a guarantee, given upon a valuable consideration, of the payment of certain promissory notes from one third party to another, and was not a guarantee of the payment of securities negotiated by the company.

I find that the plaintiff brought an action at law in the district court of Smith county, in the State of Kansas, against the trust company, on December 23, 1892, on these guarantees, by a writ served upon the president of said corporation, and on March, 1893, recov-
ered judgment thereon against the company for $9,787.50,
8 with interest at 12 per cent., and as shown in the record on December 11, 1893, $4,924.75 was paid thereon, and on September 14, 1896, an execution issued for the balance and was returned wholly unsatisfied as shown by the officer's return printed in the record.

I also find that the trust company was not a railway, religious or charitable corporation, and the business which the corporation was authorized to do was "to buy and sell personal property, including stocks, bonds, bills, notes, real and chattel mort-ages, and choses in action of every kind and description, and to transact the business of a loan and trust company;" that some time after the organization

of the company, and before the defendant became a stockholder, the directors thereof resolved "that the president and secretary of the company be, and they hereby are, authorized to guarantee the payment of all securities negotiated by the company by indorsing upon any such security one of the following forms of a guarantee;" and the resolution of the corporation and the forms of guarantees printed in the record are referred to and made a part of the findings.

Ascertaining the relations of the parties under the contract, which resulted from the Kansas constitution and the statutes and the defendant's ownership of stock, I find, so far as it is a question of fact, that the dues to be secured by the superadded stockholders' liability were such as were within the reasonable and proper scope of the business as contemplated by the parties, and that a guarantee of this character was not intended by the defendant stockholder, and was not contemplated by the Kansas constitution as a due or a debt within such scope. I also find, so far as it is a fact, that it was not within the scope of the resolution which assumed to authorize the president and secretary to guarantee securities negotiated by the company, and there is no evidence that the defendant stockholder had knowledge that the company was assuming, through its president and secretary, to guarantee the payment of claims not negotiated by itself; and there being no evidence of notice, I find, as a matter of fact, that he was not aware of it.

I also make a general finding for the defendant.

(Memorandum.—The rulings of law are contained in the opinion of the circuit court attached to this record. See page 20.)

9 And thereafterwards on, to wit, the ninth day of March A. D., 1900, the plaintiff moves for a new trial, which motion is as follows:

Motion for New Trial.

(Filed March 9, 1900.)

Now comes the plaintiff in the above-entitled action and moves this honorable court that a rehearing and new trial be granted therein for the following reasons:

Because the ruling of this court in the trial of this case, that judgment in favor of the plaintiff against the Western Investment Loan & Trust Company is not conclusive against the defendant as a stockholder in said corporation, in enforcing against him the stockholders' liability under paragraph 1192 of the General Statutes of Kansas of 1889, is a ruling contrary to the law as understood by the plaintiff and his counsel, and as laid down in prior decisions of this court and of the circuit court of appeals of this district and of other jurisdictions, and because said ruling was a surprise to the plaintiff and his counsel;

And because of this account the plaintiff did not offer evidence to show that the guaranties, upon which the plaintiff's judgment against said corporation was founded, were guaranties of obliga-

tions really owned by said corporation and negotiated by the defendant;

And further because the finding of facts upon the evidence as presented to this court is contrary to the true facts of the case in this respect, and the plaintiff, if given opportunity, will produce and offer evidence to show that the notes set out in pages 60 and 61 of the record were notes made payable to J. E. Ethell only nominally and for the convenience of said corporation and as trustee for said corporation, but that said Western Investment Loan & Trust Company really advanced the full consideration of twenty-five hundred dollars for each of said notes, and really owned said notes, and negotiated the same in the name of said J. E. Ethell, and with the guaranty of said corporation, but for the benefit and profit of said corporation, whereby said corporation became indebted to the owner thereof, for the amount paid for said notes and said guaranty; and thereby an indebtedness was created from said corporation to the owner of said notes for said amount, which could be recovered by an action against said corporation; and the plaintiff further says that said judgment by default as appearing in the record is conclusive of a valid indebtedness of said corporation to the plaintiff, although the pleadings upon which the judgment was rendered were defective and set out the plaintiff's claim in an imperfect manner.

And in proof of the facts herein alleged to be true, the plaintiff files herewith the affidavit of L. W. Wilson, of Shawnee county, in the State of Kansas, and also the affidavit of plaintiff's counsel.

And the plaintiff prays that he may be permitted to file further affidavits of said J. E. Ethell and other employees and officers of said Western Investment Loan & Trust Company as soon as said affidavits can be pureured.

Wherefore the plaintiff moves and prays that a new trial and rehearing be granted him in this case.

By his attorney, WM. REED BIGELOW.

And thereafter on, to wit, the tenth day of March, A. D. 1900, the court, the Honorable Edgar Aldrich, district judge, presiding, denies said motion for a new trial.

And on the said tenth day of March the plaintiff presents the following bill of exceptions, which said bill of exceptions on said tenth day of March is allowed:—

Bill of Exceptions.

(Filed and allowed March 10, 1900.)

This is an action at law, brought under paragraph 1192 of the General Statutes of Kansas, of 1889, and article 12, section 2, of the constitution of Kansas, to enforce the liability of the defendant as a stockholder in the Western Investment Loan & Trust Company, a corporation organized under the laws of the State of Kansas.

At the trial by the court, sitting without a jury, after a written waiver of a jury, the plaintiff put in evidence the charter of the Western Investment Loan & Trust Company; the deposition of James A. Troutman, with Exhibits A, B, E, F, G and H,
11 contained therein, and Defendant's Exhibit 1; the deposition of the defendant, Edward Joslin, with Exhibits A, B, and C contained therein; the deposition of Frederick E. Kingsbury; and a properly certified copy of the record of the judgment of H. L. Ward against The Western Investment Loan & Trust Company.

This was all the evidence in the case. The printed record, containing the plaintiff's declaration, the defendant's plea and brief statement, the amendment to the defendant's brief statement filed September 5, 1899, and the amendment to defendant's brief statement filed July 17, 1899, and also containing all the evidence in this case, is hereto annexed and marked "Exhibit 1" and made a part of this bill of exceptions. (See printed matter annexed hereto.)

At the arguments and before the findings of the court, the plaintiff presented to the court in a printed brief the following five propositions of law and requested the ruling of the court thereon, and asked the court to adopt said propositions of law in the decision of this case:

1. Upon all the evidence in the case the plaintiff is entitled to recover as a matter of law, and a finding should be made for the plaintiff for the full sum claimed in his declaration.

2. The execution in evidence in this case is an execution against the effects of a corporation within the meaning of paragraph 1192 of the General Statutes of Kansas, 1889.

3. The judgment and execution against the Western Investment Loan & Trust Company, in evidence, are included in the word "dues" in article 12, section 2, of the constitution of Kansas, and constitute such a "due" as is secured by the individual liability of stockholders in corporations organized under the laws of Kansas.

5. The guaranties of said corporation, which are declared on in the plaintiff's second, fourth and sixth causes of action in his suit against said corporation, as appears from the record in evidence, were not *ultra vires* or beyond the power of said corporation to make.

6. If the court finds that said guaranties of said corporation were *ultra vires* and beyond the power of said corporation to make, that is no defence in this action.

And thereupon the court considered said propositions of law, and ruled thereon so far as appears in the opinion. All rulings
12 made are in the opinion. And the plaintiff then and there excepted to the refusal of the court to adopt said propositions in the decision of this case, except so far as contained in the opinion, and to the refusal of the court to give said rulings as requested, and duly excepted thereto. And the plaintiff then and there duly excepted and alleged and saved his exceptions to the refusal of the court to give the said first ruling requested by him; and also to the refusal of the court to give the said second ruling requested by him, so far as the ruling conflicts with such request; (but I do not under-

stand that I passed upon that question. E. A.); also to the refusal of the court to give the said third ruling requested by him; also to the refusal of the court to give the said fifth ruling requested by him; also to the refusal of the court to give the said sixth ruling requested by him.

But the court ruled as a matter of law, among other things, as follows:

"The relations of the parties are contractual, and the term 'dues' in the Kansas constitution ought to be accepted as applying only to claims resulting from the legitimate and contemplated business of the corporation or company, such as arise in respect to transactions within the reasonable scope of the business contemplated; and, as between the creditor and stockholder, they should not be extended to claims which arise from the transaction of unauthorized business. While under section 1192 of the General Statutes of Kansas, providing the remedy, a judgment against the corporation may be accepted under proper limitations, as conclusive in a proceeding against the stockholder as to the amount and the liability of the company upon claims in respect to transactions within the contemplation of the constitution and of the parties to the contract, it should not be accepted as conclusive upon the question of the nature and character of the claims, for the reason that section 1192 is only intended to give a remedy to the creditor in respect to the kind of claims contemplated by the constitution. * * *

In the original case against the bank by the creditor, the question as to the character of the claim, whether it was one contemplated by the contract between the creditor and the stockholder was neither presented nor litigated, nor was it in a situation to be presented or litigated. While in the case now under consideration, the question is not whether the claim was an indebtedness or a due for which the bank was liable, which question was litigated and concluded by the judgment, but a question whether it was the kind of a debt or due which the statutory contract between the creditor and the stockholder covered or contemplated."

13 To the foregoing ruling of the court the plaintiff duly excepted and then and there alleged and saved his exception.

The court also ruled as a matter of law as follows:

"The judgment (of the Kansas court) on this ground is accepted as conclusive, because it relates to a corporate affair, and because the stockholder's interests are supposed to be represented by the officers of the bank in respect to affairs within the scope of its contemplated, legitimate, and authorized transactions. It would be going too far to say that the stockholder should be concluded as to the question whether the foundation and nature of the claim was within the fair intendment of the constitutional provision and the contract between the parties upon the ground of representation, for the reason that such a question is not one which in the natural and usual course of litigation between the bank and the creditor would be presented or adjudicated. The contract under the constitution is between the creditor and the stockholder of the bank in a proceeding against it by a creditor, to which the stockholder was not a

party, would neither be called upon nor be expected or allowed to present such a question for adjudication. The amount due the creditor from the bank in respect to transactions within the scope of its banking business would naturally be presented and adjudicated. * * *

The amount of the bank's indebtedness, or its liability, on a question of this kind could and would be put in issue in a suit between the creditor and the corporation; but whether such a due is within the scope of the contract between the creditor and the stockholder under the constitution would not and could not be put in issue in a suit between a creditor and the bank to which the stockholder is not a party. A case might be supposed where the bank would be liable and the stockholder not liable under the constitutional or statutory contract."

To the foregoing ruling the plaintiff duly excepted and then and there alleged and saved his exception.

The court made a general finding for the defendant.

The court also made a special finding of facts as appears in the record, and the plaintiff excepts to the same, so far as it is a matter of exception, and alleges and saves his exception to the sufficiency of the facts found to support a judgment for the defendant.

Wherefore, the plaintiff excepts to the finding of the court for the defendant upon all the evidence and the facts found, and excepts to the foregoing rulings and refusals to rule as above set forth, and prays that his exceptions may be allowed, and further prays
14 that his bill of exceptions be signed by the presiding judge and be made a part of the record in the case.

By his attorneys, WILLIAM R. BIGELOW,
WATERMAN & MARTIN,
PULSIFER & ALEXANDER.

MARCH 10, 1900.

This bill of exceptions presented to me and allowed.

ALDRICH, *J.*

Judgment.

And on the seventh day of May, A. D. 1900, it is considered by the court, the Honorable Edgar Aldrich, district judge, presiding, that the defendant, Edward Joslin, recover of the plaintiff costs taxed at $—.

A true record:

Attest: FREMONT E. SHURTLEFF, *Clerk.*

And thereafterwards on, to wit, the eighth day of May, A. D. 1900, the plaintiff files the following petition for writ of error and assignment of errors, which petition is allowed on the sixteenth day of May, A. D. 1900:—

Petition for Writ of Error.

(Filed May 8, 1900.)

To the honorable the judge of the circuit court of the United States, within and for the district of New Hampshire:

Henry L. Ward of Burlington, in the State of Vermont, respectfully petitioning, represents:

That on the fifteenth day of December, 1896, he brought an action of debt in this court against Edward Joslin, of Keene, in the district of New Hampshire, to recover of said Joslin the sum of five thousand dollars by reason of the liability imposed upon stockholders in corporations organized under the laws of Kansas,
15 other than railway, religious or charitable corporations, under paragraph 1192 of the General Statutes of Kansas of 1889.

That said action came on to be heard and tried before the Honorable Edgar Aldrich, district judge, without a jury, after a written waiver of trial by jury, on February 7, 1900; and that after hearing the court made special findings of fact and found for the defendant.

That a bill of exceptions was thereupon duly and seasonably filed by the plaintiff, and was allowed by the judge of the said court, who heard the case, and thereafter judgment was rendered for the defendant upon the finding.

That the record and proceedings in the said action show that in the trial thereof, and in the rendition of judgment therein, manifest error has happened in several matters which are set forth in the assignment of errors accompanying this petition, to the great damage of this plaintiff, your petitioner, who is aggrieved thereby.

Wherefore, your petitioner, the said Henry L. Ward, prays that a writ of error in said action may issue in due form of law, to the end that the said errors shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, and that the record and proceedings in said action be sent under the seal of said circuit court distinctly and openly, with all things concerning the same, to the United States circuit court of appeals for the first circuit, together with said writ of error, in order that the said circuit court of appeals may inspect and consider the record and proceedings aforesaid, and may, to correct the errors appearing therein, cause further to be done what of right and according to the laws and customs of the United States should be done.

Your petitioner also files with this petition an assignment of errors which sets out separately and particularly each error asserted and intended to be urged, and which is in accordance with the practice of this court and in conformity to the rules of the United States circuit court of appeals in that behalf provided.

And in further compliance with such practice and rules your petitioner, in lieu of a supersedeas bond, has deposited with the clerk of this court a sum of money approved by the judge of this court, to wit, the sum of two hundred and fifty dollars, as good and suffi-

cient security that he, Henry L. Ward, the plaintiff in error,
16 shall prosecute his writ to effect and answer all damages and costs if he shall fail to make his plea good.

HENRY L. WARD, *Treasurer*,
By his attorneys, WATERMAN & MARTIN,
WM. REED BIGELOW,
PULSIFER & ALEXANDER.

May 16, 1900.

Allowed:
EDGAR ALDRICH,
Presiding Judge.

Assignment of Errors.

(Filed May 8, 1900.)

The plaintiff in the above-entitled action, referring to the pleadings and all other matters of record therein, and particularly to the proceedings set forth in the plaintiff's bill of exceptions filed on March 10, A. D. 1900, and allowed by the court, hereby presents and files the following assignment of errors, which he asserts and intends to urge:

1. The circuit court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that,—

"Upon all the evidence in the case the plaintiff is entitled to recover as a matter of law, and a finding should be made for the plaintiff for the full sum claimed in his declaration."

2. The circuit court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that,—

"The execution in evidence in this case is an execution against the effects of a corporation within the meaning of paragraph 1192 of the General Statutes of Kansas, 1889."

3. The circuit court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that,—

"The judgment and execution against the Western Investment Loan & Trust Company, in evidence, are included in the word 'dues' in article 12, section 2, of the constitution of Kansas, and constitute such a 'due' as is secured by the individual liability of stockholders in corporations organized under the laws of Kansas."

17 4. The circuit court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that,—

"The guaranties of said corporation, which are declared on in the plaintiff's second, fourth and sixth causes of action in his suit against said corporation, as appears from the record in evidence, were not *ultra vires* or beyond the power of said corporation to make."

5. The circuit court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that,—

"If the court finds that said guaranties of said corporation were *ultra vires*, and beyond the power of said corporation to make, that is no defence in this action."

6. The circuit court erred in adopting as the law of this case and ruling as a matter of law, that,—

"The relations of the parties are contractual and the term 'dues' in the Kansas constitution ought to be accepted as applying only to claims resulting from the legitimate and contemplated business of the corporation or company, such as arise in respect to transactions within the reasonable scope of the business contemplated; and, as between the creditor and stockholder, they should not be extended to claims which arise from the transaction of unauthorized business. While under section 1192 of the General Statutes of Kansas providing the remedy, a judgment against the corporation may be accepted under proper limitations as conclusive in a proceeding against the stockholder as to the amount and the liability of the company upon claims in respect to the parties to the contract, it should not be accepted as conclusive upon the question of the nature and character of the claims, for the reason that section 1192 is only intended to give a remedy to the creditor in respect to the kind of claims contemplated by the constitution. * * *

In the original case against the bank by the creditor, the question as to the character of the claim, whether it was one contemplated by the contract between the creditor and the stockholder, was neither presented nor litigated, nor was it in a situation to be presented or litigated; while in the case now under consideration, the question is not whether the claim was an indebtedness or a due for which the bank was liable, which question was litigated and concluded by the judgment, but a question whether it was the kind of a debt or a due which the statutory contract between the creditor and the stockholder covered or contemplated."

7. The circuit court erred in adopting as the law of this case, and ruling as a matter of law, that the word "dues" in article 12, section 2 of the constitution of the State of Kansas, limits the liability of a stockholder in the Western Investment Loan & Trust Company to any particular class or kind of claims against that company.

8. The circuit court erred in adopting as the law of this case, and ruling as a matter of law, that the word "dues" in article 12, section 2, of the constitution of the State of Kansas, does not include a judgment against the Western Investment Loan & Trust Company, with execution thereon returned wholly unsatisfied, upon the following guaranty duly executed by said corporation:—

"TOPEKA, KANSAS, *May* 29, 1889.

For a valuable consideration the Western Investment Loan & Trust Company hereby guarantees payment of the within obligation, both principal and interest, at maturity."

9. The circuit court erred in adopting as the law of this case, and ruling as a matter of law, that the word "dues" in article 12, section 2, of the constitution of the State of Kansas, does not include every execution issued against the property or effects of a Kansas corporation, except a railway, or a religious or charitable corporation, when there cannot be found any property whereon to levy such execution.

10. The circuit court erred in adopting as the law of this case, and ruling as a matter of law, that,—

"The judgment of the Kansas court on this ground is accepted as conclusive, because it relates to a corporate affair, and because the stockholder's interests are supposed to be represented by the officers of the bank in respect to affairs within the scope of its contemplated, legitimate and authorized transactions. It would be going too far to say that the stockholder should be concluded as to the question whether the foundation and nature of the claim was within the fair intendment of the constitutional provision and the contract between the parties upon the ground of representation, for the reason that such a question is not one which, in the natural and usual course of litigation between the bank and the creditor, would be presented or adjudicated. The contract under the constitution is between the creditor and the stockholder. The bank, in a proceeding against it by the creditor, to which the stockholder was not a party, would neither be called upon nor be expected or allowed to present such a question for adjudication. The amount due the creditor from the bank in respect to transactions within the scope of its banking business would naturally be presented and adjudicated. * * *

19 The amount of the bank's indebtedness, or its liability, on a question of this kind could and would be put in issue in a suit between the creditor and the corporation; but whether such a due is within the scope of the contract between the creditor and the stockholder under the constitution would not and could not be put in issue in a suit between a creditor and the bank to which the stockholder is not a party. A case might be supposed where the bank would be liable and the stockholder not liable under the constitutional or statutory contract."

11. The circuit court erred in adopting as the law of this case, and ruling as a matter of law, that the defendant, as a stockholder in the Western Investment Loan and Trust Company, is not liable under paragraph 1192 of the General Statutes of Kansas of 1889 to the plaintiff, as a creditor of that corporation holding an execution against it wholly unsatisfied.

12. The circuit court erred in adopting as the law of this case, and ruling as a matter of law, that the defendant, as a stockholder in the Western Investment Loan & Trust Company, is not liable under paragraph 1192 of the General Statutes of Kansas of 1889 to the plaintiff, as a creditor of that corporation, although the Western Investment Loan & Trust Company is liable to the plaintiff.

13. The circuit court erred in not giving full faith and credit to the plaintiff's judgment and execution against the Western Investment Loan & Trust Company, in evidence, as required by article 4,

section 1, of the Constitution of the United States, and section 905 of the Revised Statutes of the United States.

14. The circuit court erred in ruling that the facts specially found by the court were sufficient to support a judgment for the defendant.

15. The circuit court erred upon the face of the record in entering judgment for the defendant.

Wherefore, the plaintiff prays that the judgment of the circuit court of the United States, for the district of New Hampshire, in the above-entitled action be reversed, and that a new trial therein may be granted, or that judgment be entered for the plaintiff upon the facts found.

By his attorneys, WATERMAN & MARTIN,
WM. REED BIGELOW,
PULSIFER & ALEXANDER.

20 I, Fremont E. Shurtleff, clerk of the circuit court of the United States, within and for the district of New Hampshire, hereby certify that in the case of H. L. Ward, treasurer, against Edward Joslin, the plaintiff has deposited in the registry of the court the sum of two hundred and fifty dollars, in lieu of a bond, to prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good.

In witness whereof, I have hereunto set my hand and the seal of said court, this seventh day of June, A. D. 1900.

[SEAL.] FREMONT E. SHURTLEFF, *Clerk.*

Opinion and Rulings of Law of the Circuit Court.

March 8, 1900.

ALDRICH, *J.:*

Upon the findings as to the transfer, I rule that it was not such a *bona fide* and complete transfer as to relieve the stockholder from his individual contractual liability, and the defendant excepts; still, upon all the foregoing findings, I order judgment for the defendant.

The relations of the parties are contractual and the term "dues" in the Kansas constitution ought to be accepted as applying only to claims resulting from the legitimate and contemplated business of the corporation or company, such as arise in respect to transactions within the reasonable scope of the business contemplated; and, as between the creditor and the stockholder, they should not be extended to claims which arise from the transaction of unauthorized business. While under section 1192 of the General Statutes of Kansas providing a remedy, a judgment against the corporation may be accepted under proper limitations as conclusive in a proceeding against the stockholder as to the amount and liability of the company upon claims in respect to transactions within the contemplation of the constitution and of the parties to the contract, it should not be accepted as conclusive upon the question of the nature and character of the claims, for the reason that section 1192 is only in-

tended to give a remedy to the creditor in respect to the kind of claims contemplated by the constitution. The judgment on this ground is accepted as conclusive, because it relates to a corporate
21 affair, and because the stockholders' interests are supposed to be represented by the officers of the bank in respect to affairs within the scope of its contemplated, legitimate and authorized transactions. It would be going too far to say that the stockholder should be concluded as to the question whether the foundation and nature of the claim was within the fair intendment of the constitutional provision and the contract between the parties upon the ground of representation, for the reason that such a question is not one which, in the natural and usual course of litigation between the bank and the creditor, would be presented or adjudicated.

The contract under the constitution is between the creditor and the stockholder, and the bank, in a proceeding against it by the creditor, to which the stockholder was not a party, would neither be called upon nor be expected or allowed to present such a question for adjudication. The amount due the creditor from the bank in respect to transactions within the scope of its banking business would, naturally, be presented and adjudicated. Quite likely decisions may be found which say that dues mean indebtedness, and perhaps liabilities, and technically this may be so; but looking at the substance of the contract, is it reasonable to say that the constitution of Kansas contemplated a contract which should bind a stockholder in respect to unauthorized and venturesome transactions outside of the scope of the business generally transacted by loan and trust companies? The amount of the bank's indebtedness, or its liability, on a question of this kind could and would be put in issue in a suit between the creditor and the corporations; but whether such a due is within the scope of the contract between the creditor and the stockholder under the constitution would not and could not be put in issue in a suit between a creditor and the bank to which the stockholder is not a party. A case might be supposed where the bank would be liable and the stockholder not liable under the constitutional or statutory contract. The rule of *res adjudicata* only extends to such questions as are actually litigated, and, under certain circumstances, to such as might be litigated.

In the original case against the bank by the creditor, the question as to the character of the claim, whether it was one contemplated by the contract between the creditor and the stockholder, was
22 neither presented nor litigated, nor was it in a situation to be presented or litigated; while in the case now under consideration, the question is not whether the claim was an indebtedness or a due for which the bank was liable, which question was litigated and concluded by the judgment, but a question whether it was the kind of a debt or due which the statutory contract between the creditor and stockholder covered or contemplated. This precise question, as has been said, was not presented, could not have been presented, in that case, and therefore is not concluded. It is for this reason that Richmond *v.* Irons, 121 U. S. 27, 61, and Schrader *v.* Manufacturers' Bank, 133 U. S. 67, 77, make a distinction between judgments upon

claims in the ordinary course of the corporate business, and claims arising outside of such ordinary and usual course—in other words, between claims within the scope of the corporation and its business, and claims *ultra vires* the corporation and its business. It is true, as claimed by the plaintiff, that the alleged due in the Schrader case was not a guarantee; but the point is not that the contingent liability in that case was the same as the contingent liability here, but that there was a judgment which it was claimed was conclusive; and in view of the fact that the record disclosed that the debt or liability was of a kind not contemplated by the constitutional or statutory contract, that the judgment against the corporation was not treated as conclusive, thus admitting of an exception to the general rule that a judgment against the corporation is conclusive. There is no question of estoppel here upon the ground that the stockholder was a part of the bank that did the business, and therefore cannot object that the bank had no right to do the business. Concord First National Bank *v.* Hawkins, 174 U. S. 364, was a case where it was held that the bank itself was not estopped from setting up its unauthorized holdings; and, if the bank was not estopped, stockholders upon principle should not be estopped.

To this ruling plaintiff excepts.

23 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *District of New Hampshire*, } ss:

I, Fremont E. Shurtleff, clerk of the circuit court of the United States for the district of New Hampshire, within the first circuit, certify that the foregoing is a true copy of the record in the cause entitled,

H. L. WARD, Treasurer, *v.* EDWARD JOSLIN. } No. 428, Law Docket.

in said circuit court determined (except that certain portions thereof are omitted and in place thereof are inserted memoranda showing where same are to be found in the bill of exceptions, Exhibit 1), the petition for writ of error, the assignment of errors, the opinion of the court, also the clerk's certificate as to deposit in lieu of bond, and the original citation upon the writ of error issued in said cause, with the acceptance of service thereof by the attorney of record of the defendant.

In testimony whereof, I hereto set my hand and affix the seal of said circuit court, at Concord, in said district, this seventh day of June, A. D. 1900.

[SEAL.] FREMONT E. SHURTLEFF, *Clerk.*

Citation on Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States — Edward Joslin, now and for more than ten years last past an inhabitant and citizen of Keene, in the State and district of New Hampshire, banker, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the first circuit, in the city of Boston, Massachusetts, on the fifteenth day of June next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of New Hampshire,
24 wherein H. L. Ward, treasurer, now and for more than ten years last past an inhabitant and citizen of Burlington, in the State and district of Vermont, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edgar Aldrich, presiding judge of the circuit court of the United States for the district of New Hampshire, this sixteenth day of May, in the year of our Lord one thousand nine hundred.

EDGAR ALDRICH,
Presiding Judge.

UNITED STATES OF AMERICA, *District of New Hampshire,* } *ss:*

MAY 25, 1900.

I hereby certify that on the twenty-fifth day of May, 1900, the within citation was duly served by acceptance of service, in behalf of the within-named Edward Joslin, defendant in error.

By JOHN S. H. FRINK,
Attorney of Record.

25 & 26 *Plaintiff's Bill of Exceptions.*

EXHIBIT 1.

Circuit Court of the United States, District of New Hampshire.

H. L. WARD, Plaintiff,
v.
EDWARD JOSLIN, Defendant. } No. 428, Law Docket.

Waterman & Martin, W. R. Bigelow, Esq., counsel for plaintiff.
J. S. H. Frink, Esq., Hiram Blake, Esq., counsel for defendant.

Pleadings and Evidence.

Printed under the direction of the clerk.

Concord, N. H.: The Rumford press, 1899.

27 & 28 Circuit Court of the United States, District of New Hampshire.

H. L. WARD, Plaintiff,
v.
EDWARD JOSLIN, Defendant. } No. 428, Law Docket.

Waterman & Martin, W. R. Bigelow, Esq., counsel for plaintiff.
J. S. H. Frink, Esq., Hiram Blake, Esq., counsel for defendant.

Pleadings and Evidence.

Printed under the direction of the clerk.

Concord, N. H.: The Rumford press, 1899.

29 *Declaration.*

(Filed May 8, 1897.)

In a plea of debt for that the said H. L. Ward, treasurer, by the consideration of the district court of Smith county, in the State of Kansas, at the March term, A. D. 1893, and on the 27th day of said March, 1893, in an action then pending in said court wherein this plaintiff, H. L. Ward, treasurer, was plaintiff, and The Western Investment Loan and Trust Company, a corporation duly chartered, created, and organized under the laws of the State of Kansas and having its chief office and place of business in the city of Topeka, in the county of Shawnee, in said State of Kansas, now and for more than eight years last past a corporation other than a religious, charitable, or railway corporation, and one S. S. Hite, Mary L. Hite, and one C. F. Jilson as trustee, one Joseph Galbrath, one M. C. Galbrath, one John Mollison, one Sarah Mollison, one Mrs. E. E. Hickman, one John N. Walker, and one Calista Walker, were defendants, re-

covered judgment against said The Western Investment Loan and Trust Company in the sum of nine thousand seven hundred eighty-seven and fifty one-hundredths dollars ($9,787.50), and the costs of said action taxed at $—, as by the record thereof in said court now remaining appears; that said court was a court of general jurisdiction duly created by the laws of said State of Kansas, and said defendant, The Western Investment Loan and Trust Company, was duly and personally served with a summons in the action wherein said judgment was rendered, and no part of the said judgment has been paid, except the sum of four thousand nine hundred twenty-four and seventy-five one-hundredths dollars ($4,924.75), which was paid on the 11th day of December, 1893; that said judgment, according to its terms, bears interest at the rate of twelve per cent. per annum since its rendition, which is in accordance with the law of the State of Kansas; that after deducting said sum of four thousand nine hundred twenty-four and seventy-five one-hundredths dollars ($4,924.75), the balance now remaining due upon said judgment with the interest thereon amounts to six thousand eight hundred thirty-three and sixty-one one-hundredths dollars ($6,833.61), now
30 unpaid and unsatisfied; that on the 14th day of September, A. D. 1896, an execution was issued out of said district court of Smith county, in the State of Kansas, on said judgment and for the unpaid balance thereof as last aforesaid against the property and effects of the said The Western Investment Loan and Trust Company, and on or about the 4th day of November, A. D. 1896, said execution was returned by the sheriff of said Smith county, and there was endorsed thereon the sheriff's return that after diligent search and inquiry duly made by him for goods, chattels, lands, tenements, and property of the judgment debtor therein named, the Western Investment Loan and Trust Company, whereon to levy said writ, he was unable to find and could not find any goods, chattels, lands, tenements, or property whatever of said judgment debtor, the Western Investment Loan and Trust Company, a corporation whereon to levy said writ, and therefore returned the same on said 4th day of November wholly unsatisfied; that in fact there could not at the time said judgment was rendered, nor at any time since that date, any property be found whereon to levy said execution, or any execution, but the said The Western Investment Loan and Trust Company on the 1st day of July, 1894, became, and ever since has continued to be, insolvent, and has during all that time had and now has no property or assets of any kind or value whatever; that several years prior to the rendition of said judgment against the said The Western Investment Loan and Trust Company there was duly issued to Edward Joslin, the defendant in this case, one hundred shares of the capital stock of the said The Western Investment Loan and Trust Company, as evidenced by a certificate duly executed by the said The Western Investment Loan and Trust Company, and as appears by the books of said corporation; that the par value of each one of the shares of the capital stock of the said The Western Investment Loan and Trust Company, and of each one of the shares of stock issued to said Edward Joslin, was fifty

dollars ($50), and that the whole amount of the par value of the stock so issued to the said Edward Joslin, and which he has ever since owned and still owns, was five thousand dollars ($5,000), and said Edward Joslin at the date of the rendition of said judgment and for several years prior thereto was, ever since has been and still is, a stockholder in the said The Western Investment Loan and Trust Company, and during all that time has owned and still owns said one hundred shares of the capital stock of said corporation, and said capital stock was issued to said Edward Joslin, still stands in his name upon the books of the said The Western Investment Loan and Trust Company, and has so stood for more
31 than five years last past; that the place of business of the said The Western Investment Loan and Trust Company is in the city of Topeka, in the county of Shawnee, in said State of Kansas, and that the matter in dispute in this action exceeds, exclusive of interest and costs, the sum of two thousand dollars ($2,000); that by reason of the premises and by virtue of the constitution and the statutes of the State of Kansas, in such case made and provided, a right of action hath accrued to the said H. L. Ward, treasurer, against said Edward Joslin, to have and recover by the judgment of this court the sum of five thousand dollars ($5,000), which is an amount equal to the amount of stock by him owned in said corporation during the time aforesaid, and the costs of this action, yet the said Edward Joslin, though requested, has not paid the sum, or any part thereof.

Also, in a further plea of debt for that at all times herein mentioned, and prior to its dissolution as hereinafter alleged, The Western Investment Loan and Trust Company was, and has been, a corporation duly chartered, created, and organized under the laws of the State of Kansas, and that its chief office and place of business was in the city of Topeka, in the county of Shawnee, in said State of Kansas; that said corporation was not a railroad, railway, religious or charitable corporation, but it was a corporation chartered and organized for the purpose of transacting a general investment loan and trust business, buying and selling commercial paper, obligations and securities, and in the course of its business and under its charter as it was authorized to do, endorsed and guaranteed the payment of notes and obligations negotiated by it; that heretofore; to wit, on the 1st day of July, A. D. 1894, said The Western Investment Loan and Trust Company became wholly insolvent and absolutely, wholly, and entirely suspended business and ceased to do business, and that the suspension of business of said corporation has continued from said 1st day of July, A. D. 1894, to the time of issuing this writ, and has continued for the space of more than one year preceding the commencement of this action, and that during all that time said corporation has ha and now has no property or assets of any kind or value; that by reason of the suspension of business of said corporation and its insolvency and failure to pay its indebtedness, as hereinbefore alleged, said corporation became and was dissolved for the purpose of enabling this plaintiff to pursue the defendant herein as a stockholder of said corporation; that since its dissolu-

tion, as aforesaid, said corporation has left unpaid the indebtedness aforesaid and hereinafter described; that at the time said corporation suspended business, as aforesaid, and ever since said time, and
32 ever since it became dissolved by its suspension of business, continued for the space of more than one year, as aforesaid, it has left wholly unpaid the indebtedness owing by said corporation to this plaintiff, to wit, the notes and judgment thereon hereinafter mentioned; that heretofore, to wit, on the 12th day of September, A. D. 1888, in Shawnee county, State of Kansas, one S. S. Hite and Mary L. Hite, for valuable consideration, executed and delivered to one J. E. Ethell, their three certain promissory notes in writing of that date, and thereby for value received promised to pay to the order of said J. E. Ethell, three several sums of two thousand five hundred dollars ($2,500) each, on the 12th day of September, A. D. 1892, with interest on said several sums at the rate of seven per cent. per annum from date until paid, payable semi-annually according to the tenor of eight interest notes attached to each of said three principal notes, bearing even date therewith, both principal and interest payable at the office of said The Western Investment Loan and Trust Company in Topeka, Kansas; that each of said three principal notes provided that they should draw twelve per cent. interest per annum after their maturity; that attached to each of said three principal notes were eight interest notes of even date therewith for the semi-annual instalments of interest to become due on each of said three notes, each interest note being for the sum of seventy-seven and fifty one-hundredths dollars ($77.50), all of which coupons or interest notes were executed by said S. S. Hite and Mary L. Hite, and delivered to said J. E. Ethell at the time said principal notes were delivered, and each of said coupons were payable at the said office of said corporation in Topeka and to the order of said J. E. Ethell; said coupons matured respectively at the dates when said semi-annual instalments of interest upon said three principal notes became due.

That after the execution of said three principal notes and the respective coupons attached thereto, and prior to the maturity of said notes, said J. E. Ethell, for a valuable consideration, endorsed each of said principal notes as follows: "Without recourse pay to the order of H. L. Ward, treasurer. J. E. Ethell," and at the time of making said three endorsements, said J. E. Ethell endorsed each of said three interest notes, or coupons, as follows: "Without recourse. J. E. Ethell;" that all of said endorsements were in writing executed by said J. E. Ethell and endorsed on the back of said three principal notes and coupons thereto attached respectively; that at the time said three notes and said three coupons were endorsed by said Ethell, the said three principal notes were also
33 endorsed by said corporation, the Western Investment Loan and Trust Company, for a valuable consideration in said Shawnee county; that the said endorsements of said corporation were in writing executed and endorsed on the backs of said three notes by said corporation, as follows: "Topeka, Kansas, May 9th, A. D. 1889, for a valuable consideration the Western Investment

Loan and Trust Company hereby guarantees payment of the within obligation both principal and interest at maturity. The Western Investment Loan and Trust Company by L. L. Turner, president. Attest, Samuel T. Howe, secretary;" that said three principal notes were so, as aforesaid, endorsed by said Ethell and by said The Western Investment Loan and Trust Company; that the said interest notes thereto attached so as aforesaid endorsed by said Ethell — for a valuable consideration sold, transferred, and delivered to the plaintiff herein, H. L. Ward, treasurer, the person named in the endorsements on the backs of said three principal notes, who thereby became the owner of said three principal notes and coupons thereto attached; that the endorsements aforesaid of said corporation, the Western Investment Loan and Trust Company, were duly executed by it, by its president, L. L. Turner, and attested by its secretary, Samuel T. Howe; that at the time of the execution of said endorsements of said corporation by it, L. L. Turner aforesaid was the duly elected, qualified, and acting president of said corporation, and said Samuel T. Howe was the duly elected, qualified, and acting secretary of said corporation; and said officers of said corporation were duly authorized and empowered by said corporation, the Western Investment Loan and Trust Company, to make and execute said three endorsements on said three principal notes, and to bind said corporation by the guaranty of the payment of said three notes as provided in said endorsements; that said three principal notes and the coupons thereto respectively attached were in fact negotiated by said corporation, the Western Investment Loan and Trust Company, in the regular course of its business, and it furnished the money, to wit, seven thousand five hundred dollars ($7,500), which was loaned to said Hites as the consideration for said notes and for which said notes were given and received, and took and received said three principal notes and coupons from said Hites payable to the order of said J. E. Ethell for its own convenience, said Ethell being one of the officers, agents, or employés of said corporation at the times of said transaction, and having no beneficial interest in or to said notes; that by reason of said three endorsements by it, as aforesaid, said corporation guaranteed to this plaintiff the payment of said
34 three principal notes and interest thereon, and became and was liable to plaintiff for the payment thereof, as guarantor of payment of the same.

The plaintiff further alleges that heretofore, to wit, on the 27th day of March, A. D. 1893, in an action based on said notes, coupons, endorsements, and guarantees then pending in the district court of Smith county, in the State of Kansas, wherein this plaintiff, H. L. Ward, treasurer, was plaintiff, and said S. S. Hite, Mary L. Hite, C. F. Jilson, as trustee, and said The Western Investment Loan and Trust Company, said corporation, and Joseph Galbrath and M. C. Galbrath, John Mollison, Sarah Mollison, Mrs. E. E. Hickman, John N. Walker and Calista Walker were defendants, this plaintiff, H. L. Ward, treasurer, plaintiff in said action by the consideration of said district court duly recovered the judgment in favor of said plaintiff and against said The Western Investment Loan and Trust Company

for the sum of nine thousand, seven hundred eighty-seven and fifty one-hundredths dollars ($9,787.50), and the costs of said action taxed at $—, as appears by the records of said court now remaining; that said action, in which said judgment was rendered, was one brought by said plaintiff to recover a personal judgment against said The Western Investment Loan and Trust Company for the amount due upon said three principal notes and the coupons hereinbefore mentioned, and to foreclose a certain real-estate mortgage on certain land therein described executed by said makers of said notes for the purpose of securing their payment; that said land was duly sold for the sum of five thousand dollars ($5,000), which after deducting the costs left the sum of four thousand nine hundred twenty-four and seventy-five one-hundredths dollars ($4,924.75) to apply upon said judgment, which being deducted therefrom left a balance of six thousand eight hundred thirty-three and sixty-one one-hundredths dollars ($6,833.61), unpaid and unsatisfied thereon. And the plaintiff alleges that on the 14th day of September, A. D. 1896, there were duly issued out of said district court of Smith county, Kansas, two executions for said amount then remaining due and unsatisfied on said judgment hereinbefore mentioned, one directed to the sheriff of Smith county, Kansas, and one directed to the sheriff of Shawnee county, Kansas, in which latter county said The Western Investment Loan and Trust Company always had and kept its general and head office and place of business, and in which it was located, and there could not be and was not found any property whatever of said judgment debtor, the Western Investment Loan and Trust Company, as appears by the officer's returns thereon, whereon to levy said executions, or either of them, and said executions were on the 4th of November, 1896, duly returned to and filed in said district court of Smith county, Kansas, wholly unsatisfied; and the plaintiff alleges that said defendant, The Western Investment Loan and Trust Company, has never paid said notes or coupons, or any part thereof; and that none of the endorsers or signers of said notes or coupons have paid the *sum* or any part thereof, but that the same remain wholly unpaid; that said defendant, The Western Investment Loan and Trust Company, has never paid or satisfied said balance of said judgment, though often requested, but that the same still remains unpaid and unsatisfied; that several years prior to the giving of said notes and to the dissolution of said corporation, as aforesaid, there was duly issued to Edward Joslin of Keene in the county of Cheshire and State of New Hampshire, the defendant in this action, one hundred shares of the capital stock of the said The Western Investment Loan and Trust Company, as evidenced by a certificate duly executed by the said The Western Investment Loan and Trust Company, and as appears upon the books of said corporation; that the par value of each one of the shares of the capital stock of the said The Western Investment Loan and Trust Company, and of each one of the shares of stock issued to said Edward Joslin, as aforesaid, was fifty dollars ($50), and that the total amount of the par value of said stock so issued to Edward Joslin was and is five thousand dollars ($5,000); that the said stock issued to said Edward Joslin still

35

stands in his name upon the books of the said The Western Investment Loan and Trust Company, and has so stood for more than five years; and said Edward Joslin at the date of the rendition of said judgment, and for several years prior thereto, was, ever since has been, and still is a stockholder in the said The Western Investment Loan and Trust Company; that the place of business of the said The Western Investment Loan and Trust Company always was during its existence and until its dissolution, as aforesaid, in the city of Topeka, in the county of Shawnee, and State of Kansas; that the matter in dispute in this action exceeds, exclusive of interest and costs, the sum of two thousand dollars; that by reason of the premises and by virtue of the constitution, statutes, and law of the State of Kansas in such case made and provided, a right of action hath accrued to the said H. L. Ward, treasurer, against said Edward Joslin to have and recover by the judgment of this court the sum of five thousand dollars ($5,000), being an amount equal to the amount of stock by him owned in said corporation, as aforesaid, yet the said Edward Joslin, though requested, has not paid the same, or any part thereof.

36 *Defendant's Plea and Brief Statement.*

(Filed Dec. 26, 1897.)

And now comes the defendant, by his attorneys, and defends, etc., when, etc., and says that he is not indebted to the plaintiff in the manner and form as the plaintiff has declared against him, and of this he puts himself upon the country.

By his attorneys, J. S. H. FRINK,
H. BLAKE.

And under said plea, the defendant makes the following brief statement of defence:

1. That the defendant was not at the time said cause of action is said to have accrued, nor was he at the time said action was commenced, a stockholder in said The Western Investment Loan and Trust Company, as in plaintiff's declaration claimed.

2. Also, that said The Western Investment Loan and Trust Company never indorsed the said promissory notes and obligations in the plaintiff's second count, in his declaration described, or the coupons thereto attached nor guaranteed the payment of said notes and obligation as is in plaintiff's said declaration set forth.

3. And the defendant also says that said The Western Investment Loan and Trust Company did not at the time in said second count in said declaration set up, or at any other time before the commencement of this action, suspend and cease to do business, and denies that the said The Western Investment Loan and Trust Company had not at the commencement of said action any property or assets of any kind or value, or that said corporation has ever been dissolved.

4. Also the defendant will claim as a defence, upon the trial of

said case that there is not any such record of any judgment as is in the plaintiff's declaration alleged in favor of the plaintiff against said The Western Investment Loan and Trust Company.

Amendment to Defendant's Brief Statement.

(Filed and allowed Sept. 5, 1899.)

The defendant moves to amend his brief statement of defence by adding the words "upon the trial of the issues in this case the defendant will show that the claim against the Western Investment Loan and Trust Company, upon which a judgment in favor
37 of the plaintiff against said company was founded, was not a due from or debt of said corporation, for which the defendant as a stockholder in said corporation was liable under the constitution and laws of Kansas."

HIRAM BLAKE,
J. S. H. FRINK,
Attorneys for Defendant.

Sept. 5, '99.—Allowed.—E. A.

Amendment to Defendant's Brief Statement.

(Filed July 17, 1899.)

To the circuit court, May term, 1899:

And now the defendant moves to amend his brief statement in above-entitled action, by adding to his brief statement thence further defenses in the words following:

* * * * * * * *

5. The defendant also says that said Western Investment Loan and Trust Company was never legally incorporated.

6. The defendant also says that said Western Loan and Investment Trust Company never had any authority to endorse the said promissory notes and obligations in the second count in plaintiff's declaration described, or to guarantee the payment of said notes and obligations.

7. The defendant also says that no judgment was ever recovered against the Western Investment Loan and Trust Company, as the plaintiff sets up in his declaration.

By his attorneys, J. S. H. FRINK,
HIRAM BLAKE.

Allowed.

38 *Evidence.*

(Filed Sept. 4 and 5, 1899.)

A duly certified copy of the charter was put in evidence, as follows:

Charter of the Western Investment, Loan and Trust Company of Topeka, Kansas.

The undersigned, citizens of the State of Kansas, do hereby voluntarily associate ourselves together for the purpose of forming a private corporation under the laws of the State of Kansas, and do hereby certify:

First. That the name of this corporation shall be the Western Investment, Loan and Trust Company.

Second. That the purposes for which this corporation is formed are to buy and sell personal property, including stocks, bonds, bills, notes, real and chattel mortgages, and choses in action of every kind and description, and to transact the business of a loan and trust company.

Third. That the places where its business is to be transacted are at Topeka, Kansas, and such other places as the company by its by-laws may designate.

Fourth. That the term for which this corporation is to exist is fifty years.

Fifth. That the number of directors trustees of this corporation shall be nine and the names and residences of those who are appointed for the first year are:

M. A. Low.
A. Washburn.
S. L. Leavitt.
J. B. Bartholomew.
J. W. Stout.
O. E. Walker.
R. M. Crane.
L. L. Turner.
Samuel T. Howe.

Sixth. That the estimated value of the goods, chattels, lands, rights and credits owned by the corporation is — dollars.

That the amount of the capital stock of this corporation shall be two hundred and fifty thousand dollars, and shall be divided into five thousand shares of fifty dollars each.

39 In testimony whereof, we have hereunto subscribed our names this 25th day of February, A. D. 1888.

L. L. TURNER.
J. W. STOUT.
R. M. CRANE.
WM. WADSWORTH.
SAM'L T. HOWE.
M. A. LOW.

STATE OF KANSAS, *Shawnee County,* } ss:

Personally appeared before me, a notary public in and for said county, Kansas, the above-named L. L. Turner, J. W. Stout, R. M. Crane, Wm. Wadsworth, Sam'l T. Howe, M. A. Low, who are personally known to me to be the same persons who executed the foregoing instrument of writing, and duly acknowledged the execution of the same.

In testimony whereof, I have hereunto subscribed my name and affixed my notarial seal, this twenty-fifth day of February, A. D. 1888.

[SEAL.] GEO. S. HOVEY,
Notary Public.

My commission expires Sept. 30, 1891.

Deposition of James A. Troutman.

(Stipulation for taking deposition omitted.)

STATE OF KANSAS, *County of Shawnee,* } ss:

Deposition of James A. Troutman, taken before me, Robert Stone, a notary public within and for the county of Shawnee and State of Kansas, on the 2d day of June, A. D. 1898, between the hours of 8 o'clock a. m. and 6 o'clock p. m., at the office of Robert Stone, in the Crawford building at Topeka, Shawnee county, Kansas, in the case of H. L. Ward, treasurer, plaintiff, *v.* Edward Joslin, pursuant to the annexed stipulation, to be read in evidence on behalf of the plaintiff in the above-entitled action, now pending in the United States circuit court, district of New Hampshire, the said plaintiff appearing by Pulsifer & Alexander, his attorneys, and the said defendant appearing by Elijah Robinson, his attorney.

JAMES A. TROUTMAN, of lawful age, being by me first duly examined, cautioned, and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says, as follows:

40 Questions by Mr. ALEXANDER:

Q. 1. State your name, age, place of residence, and occupation?

A. James A. Troutman; age 44 years; attorney-at-law; Topeka, Shawnee county, Kansas.

Q. 2. What connection, if any, have you with the Western Investment Loan and Trust Company, a corporation under the laws of the State of Kansas, and having its general office and place of business in Topeka?

A. I am its president.

Q. 3. How long have you been such president?

A. I would have to examine the records to give you the date. Since the 10th day of March, 1892.

Q. 4. Before that time what connection, if any, had you with that company?

A. I had been secretary and treasurer of the company for a short time.

Q. 5. Were you a stockholder of the company?

A. Yes, sir.

Q. 6. About how long had you been a stockholder?

A. From the organization of the company.

Q. 7. I understand you are president of the company at this time?

A. Yes, sir.

Q. 8. As president of the company have you in your custody and under your control the books and the records containing the proceedings of the board of directors and stockholders of the company?

A. I have.

Q. 9. Will you please produce it?

A. I have the book referred to.

Q. 10. Where are the books kept?

A. At the office of Troutman & Stone, in the Crawford building, in the city of Topeka, Shawnee county, Kansas.

Q. 11. Are you willing to permit any of the original books and records to be taken from the State of Kansas to New Hampshire to be used on the trial of this case?

A. No, sir.

Q. 12. Will you make a full, true, and complete copy of the book you have produced as containing the records and the proceedings of the board of directors and stockholders of said company, and mark it Exhibit "A" and make it a part of your deposition?

A. I will if desired.

Q. 13. We desire it.

A. I will do that.

41 Q. 14. Have you now done so?

A. Yes, sir.

Q. 16. How have you identified such copy?

A. As Exhibit "A."

Q. 17. Is Exhibit "A" a full, true, and complete copy of the record book produced and testified to?

(Exhibit "A" introduced in evidence and objected to. See page —.)

A. It is.

Q. 18. Did the company have any other book in which it kept the record and the proceedings of the stockholders and the board of directors than the one produced?

A. I think not.

Q. 19. Does the book testified to contain the charter and by-laws of the corporation?

A. It does.

Q. 20. I notice in the book under the head of by-laws, and under the subhead of stock, these words: "A transfer book shall be provided in which all assignments and transfers of stock shall be made." Please state if the company had a book in which it kept the record of persons who were stockholders showing the transfer of their stock?

A. It had such a book.

Q. 21. Will you please produce that book? The stock and transfer book?

A. I will.

Q. 22. Is that the book which you hold in your hands?

A. It is.

Q. 23. Please examine that book and state if it contains the name of Edward Joslin?

A. It does.

Q. 24. On what page of the book, please?

A. Page 23.

Q. 25. Will you make a true, full, and complete copy of that portion of the book which refers to Edward Joslin, and mark the same Exhibit "B," and attach it to your deposition as a part of the same?

A. I will.

Q. 26. Have you now done so?

A. I have.

Q. 27. Is Exhibit "B" a full, true, and complete copy of that portion of the book you testified to referring to Edward Joslin?

A. It is.

* * * * * * *

42 Q. 28. State whether or not there is any entry in that book on page 23, or in any part of the book, showing any transfer by Mr. Joslin of his stock in the Western Investment Loan and Trust Company?

Mr. FRINK: I object to that question, because the entry itself shows that. It is not admissible.

Mr. BIGELOW: We cannot show the absence of such an entry, except by such evidence as this.

The COURT: The answer to that, of course, is that if it is a complete record in that particular it shows itself whether there is anything upon it. It shows by the absence of the entry as well as it would show the opposite by the existence of it on the record.

Mr. BIGELOW: I ask him now, if it shows in any part of the book?

The COURT: You may read the answer.

Mr. FRINK: My exception is that the record itself is the best evidence.

A. There is no such entry.

Q. 29. What was that book last mentioned known as among the company's officers?

A. A record of shares.

* * * * * * *

Q. 30. Are you acquainted in a business way with the plaintiff in this case, H. L. Ward, treasurer?

A. I am not.

Q. 31. Did you ever have any correspondence with him?

A. It is probable that I did, but I can't remember any special instance just now.

Q. 32. I wish you would state how you came to become president

of the Western Investment Loan and Trust Company, giving in detail the circumstances of the company at that time.

A. I was elected president by the board of directors on the date indicated in the records, and prior to that had served about a year as secretary and treasurer. To answer your question fully it will be necessary to go back to the meeting at which I was elected secretary and treasurer.

Q. 33. I wish, Mr. Troutman, to have you state somewhat in detail and in your own way the condition of the Western Investment Loan and Trust Company, that is, its financial condition, January 1, 1890, and it was for that information that I asked you the previous question.

A. My official connection with the company dates from
43 May 1, 1891, when I was elected secretary and treasurer, and my detailed information as to the condition of the company was obtained at that time and subsequently the Western Investment Loan and Trust Company and the Kansas national bank occupied the same building. * * * Mr. Wilson was elected president and I was elected secretary and treasurer, and from that time on the business of the company was conducted in my office. Mr. Wilson having charge from May 1, 1891, until March 10, 1892, at which time he resigned as president and left the State, and from that time to this I have had exclusive control of the affairs and books of the company.

Q. 34. Mr. Troutman, state what the financial condition of the Western Investment Loan and Trust Company was in January, 1891, with reference to solvency or insolvency.

A. The company was insolvent at that time. I make this statement absolutely because I have knowledge of its insolvency at the time of my election or official connection with it, and from the fact that there had been no particular change in it from January 1, 1891, to May 1, 1891.

Q. 35. From the time that you became connected with the company both as secretary and treasurer in the first instance and as president in the latter, I understand that the company was insolvent?

A. It was.

Q. 36. What was the character and value of its assets?

A. Its assets consisted of notes generally secured by second mortgages and a few first mortgages upon suburban property that had but little value.

Q. 37. Since you have been president of the company and had exclusive management and control of its affairs, have you been able to realize upon the assets it had when you first took charge of its affairs as president?

A. Only a limited amount has been realized. In most instances the first mortgages were foreclosed and the property failed to bring enough to satisfy these mortgages, and in many cases the Western Investment Loan and Trust Company had guaranteed the notes secured by the first mortgages and at the end of the litigation the

second mortgages were wiped out and a judgment was left against the company for the balance on the first mortgages.

Q. 38. State whether or not it was the rule of the company to advance interest that became due on first mortgages where they held second mortgages on the same property, and also to pay taxes?

A. It was prior to my connection with the company. It was in no condition to do so after May 1, 1891.

44 Q. 39. State in round figures, as nearly as you can get at it, the total amount of the liabilities of the Western Investment Loan and Trust Company at the time you took charge of its affairs?

A. I can't pretend to do that correctly. I prepared a statement soon after my connection with the company, but have no copy of it. I only know that the liabilities were greater than the assets.

Q. 40. Examine this book which I now hand you, that is page 42 of the book, and state first whether or not that is one of the record books kept by the company.

A. This is one of the books kept by the company.

Q. 41. Is not the matter on said page 42 of that book a general statement of the company's condition of date August 26, 1891?

A. It is.

Q. 42. State whether or not there is any detailed statement of the company's financial condition of a later date than the one just shown you in any of the company's books?

A. None that I know of.

Q. 43. Will you please make a full, true, and complete copy of page 42 of said book last testified to, and mark the same Exhibit "E" and attach it to and make it a part of your deposition?

A. I will.

Q. 44. Have you now done so?

A. I have.

Q. 45. Is said Exhibit "E" a full, true, and complete copy of said page 42 of said record book last testified to?

A. It is.

Q. 46. Now, Mr. Troutman, refreshing your recollection from page 42 of the record book last mentioned can you state, approximately, the total amount of rediscounted paper? Paper that the Western Investment Loan and Trust Company had negotiated and become liable for its payment as guarantor, indorser or otherwise, at that time?

A. This report indicates $128,212.80, which I have no doubt is correct at that date.

Q. 47. Do you think that that amount was materially changed afterwards?

A. It was somewhat, but not a great deal.

Q. 48. Refreshing your recollection from the same source, can you state about what the total amount of bills receivable of the company were at that time?

A. $223,899.62.

45 Q. 49. State whether or not that amount after that date, August 26, 1891, was ever very materially changed?

A. It was not. It consisted largely of the second-mortgage security which had no real value.

Q. 50. Give your best recollection as to the per cent. of that total amount of bills receivable you were ever able to collect or realize upon?

A. Without pretending to be mathematically correct I should say considerably less than ten per cent.

* * * * * * *

Q. 51. Now coming down a little later in the history of the company, say the 1st of June, 1894; what was the company's financial condition?

A. It was hopelessly insolvent at that time.

Q. 52. When was the last dividend declared by the company?

A. I can only tell by an examination of the books. It was some time prior to my connection with it officially. The records show that the last dividend was declared July 1, 1890, of three per cent.

* * * * * * *

Q. 53. Now state, Mr. Troutman, what business, if any, the company did after you became its president?

A. The only business the company transacted after I became president was to attempt to collect its assets and as far as possible to take care of its obligations. There was no new business done. There was some outstanding obligations that we renewed from time to time and carried them along that way.

Q. 54. State whether or not when you were secretary, treasurer, or president, or prior to June 1, 1894, there was more or less correspondence between you and the stockholders of the company?

A. There were frequent inquiries from stockholders.

Q. 55. Were there any inquiries made by stockholders as to the condition of the company and calling for a reason why dividends were not declared?

A. Such inquiries were made.

Q. 56. State whether or not the stockholders were given true information as to the condition of the company?

A. They were.

Q. 57. You have no personal acquaintance with Edward Joslin?

A. I have not.

Q. 58. Have you any personal acquaintance with one Frederick E. Kingsbury?

A. I have not.

46 Q. 59. Did you ever have any business correspondence of any kind or character with one Frederick E. Kingsbury?

A. I do not know. I have no recollection of any.

Q. 60. On June 1, 1894, or at any time thereafter did the Western Investment Loan and Trust Company have any tangible property upon which an execution could be levied?

A. It did not have.

Q. 61. Had it any property upon which an execution could be levied for a long time prior to that date?

A. No, sir, it had not.

Q. 62. State whether or not previous to June 1, 1894, the officers of the company, with the knowledge of the stockholders had resolved to wind the company up and settle up the business as best it could?

A. That was the instruction given to Mr. Wilson and myself when we were elected to our respective offices, and we proceeded to carry out the instructions as rapidly as possible, which was not very rapid, however.

* * * * * * *

Q. 63. Is it not a fact of common knowledge, Mr. Troutman, in Topeka and in this State that loan companies, whose business consisted in loaning on the security of second mortgages, almost always go to the wall?

A. That is true not only generally, but universally.

Q. 64. Do you know of any companies who went into business in January, 1890, and by January, 1893, had failed absolutely?

A. I know several companies that went to the wall about that time, or a little later.

Cross-examination.

Questions by Mr. ROBINSON:

Q. 65. You would not say that the defendant in this case ever corresponded with you, or you with him?

A. No, sir, I would not.

Q. 66. When did you ascertain that the company was insolvent?

A. A short time before the meeting at which I was elected secretary and treasurer.

* * * * * * *

Q. 67. Does this book which you referred to a while ago hold or show all of the stock that was issued?

A. Presumably it does.

Q. 68. I wish you would see if it shows any stock issued to Frederick E. Kingsbury?

47 A. I don't find his name in the index.

Q. 69. Is that your signature to that certificate? (Showing witness a paper.)

A. It is.

Q. 70. Well, how do you account for the record not showing it?

A. Simply a neglect to enter it upon the book.

Q. 71. Is it not your recollection that Mr. Joslin requested you to transfer on the books of the company the stock that stood in his name?

A. I have no recollection about the matter. Undoubtedly he did or this certificate would not have been issued.

Q. 72. Then you would say that the request was made for the transfer, but it was not entered on the books through neglect?

A. Undoubtedly Mr. Joslin or some one representing him, requested the transfer of the certificate, and through an oversight it was not entered on the record of shares.

Q. 73. Now, Mr. Troutman, is that certificate No. 125 a certificate of stock issued by the company?

A. It is.

Q. 74. That is your signature as president?

A. Yes, sir.

Q. 75. Whose signature is that as secretary?

A. C. E. Gault.

Q. 76. He was secretary at that time?

A. Yes, sir.

Q. 77. Is he secretary yet?

A. Yes, sir.

Q. 78. Are you president yet?

A. Yes, sir.

Q. 79. Do you know whether that certificate was issued on the same stock as stood in the name of Mr. Joslin?

A. I can ascertain.

Q. 80. I wish you would.

A. Certificate No. 125 as shown by the certificate of stock was issued in lieu of certificate No. 37, which was issued November 24, 1888, to Edward Joslin.

Q. 81. Have you the original certificate that was issued to Edward Joslyn?

A. I find it in the certificate book.

Q. 82. Was that certificate pinned to the stub of the stock that was issued to Frederick E. Kingsbury?

A. It was.

48 Q. 83. I will get you to read to the stenographer the indorsement on the back of that certificate.

A. "For value received, I do hereby sell, assign, and transfer to Frederick E. Kingsbury, 100 shares of the within-mentioned capital stock of the Western Investment, Loan and Trust Co., and hereby constitute and appoint —— —— my attorney irrevocably, to transfer said stock on the books of the said company, with power to substitute any person for that purpose. Dated, Keene, N. H., June 9, 1894. Edward Joslin."

Q. 84. Now, Mr. Troutman, refreshing your recollection from that certificate, and what you find in the book, and from the certificate issued to Frederick E. Kingsbury, I will get you to state whether you can say that Mr. Joslin requested the transfer to be made on the books of the company?

A. I have no recollection about the matter, and can only testify as to what the certificate and books show. This certificate of Edward Joslin was undoubtedly delivered to me, or sent to me as president of the company for the purpose of having the transfer made to Frederick E. Kingsbury, and Mr. Joslin or some one representing him undoubtedly made that request.

Mr. ROBINSON: We ask that certificate No. 125, issued to Frederick E. Kingsbury, be marked by the stenographer "Defendant's Exhibit I" and attached to and made a part of this deposition.

Redirect examination.

Questions by Mr. ALEXANDER:

Q. 85. Are you willing to allow certificate No. 37 to Edward Joslin, which is pinned to stub No. 125, concerning which certificate and stub you have just testified in cross-examination, to be attached to your deposition and made a part of it?

A. I am not.

Q. 86. Will you make a full, true, and complete copy of certificate No. 37 to Edward Joslin about which you have testified, and mark the same Exhibit "F" and attach it to and make it a part of your deposition?

A. I will.

Q. 87. Have you now done so?

A. I have.

Q. 88. Is Exhibit "F" a full, true, and complete copy of certificate No. 37, including therewith the endorsement on the back of said certificate No. 37?

49 A. It is.

Q. 89. Referring to the matter of the endorsement on the back of the original certificate No. 37, state if the name or word "Harry" is not written and then cancelled with cancellation marks before the name "Frederick E. Kingsbury"?

A. It is.

Q. 90. State also if the word "thirty" is not written and then crossed out with cancellation marks before the words "one hundred" in the endorsement on said certificate No. 37?

A. It is.

Q. 91. Will you please make a full, true, and complete copy of stub No. 125, to which certificate No. 37 testified about is pinned and mark it Exhibit "G," and attach it to and make it a part of your deposition?

A. I will.

Q. 92. Have you now done so?

A. I have.

Q. 93. Is Exhibit "G" a full, true, and complete copy of stub No. 125, to which certificate No. 37 testified about is pinned?

A. It is.

Q. 94. Will you please make a full, true, and complete copy of stub No. 37, the stub of the original certificate No. 37 testified about, and mark the same Exhibit "H" and attach it to and make it a part of your deposition?

A. I will.

Q. 95. Have you now done so?

A. I have.

Q. 96. Is Exhibit "H" a full, true, and complete copy of stub No. 37, the stub of the original certificate No. 37 testified about?

A. It is.

Q. 97. Will you permit any of the books or papers which you have produced to be taken to New Hampshire to be used as evidence on the trial of this action?

A. I will not.

Q. 98. Is there anything, Mr. Troutman, on stub 37 in the certificate of stock book that would indicate that the original certificate No. 37, which had been detached therefrom and issued to Edward Joslin, had been transferred from Joslin to any one else?

A. There is not.

* * * * * * *

Mr. BIGELOW: I will read part of Exhibit "A" of Mr. Troutman's deposition.

50 Mr. FRINK: I object to this record, and my objection is that, as a general proposition of law, the records of a corporation are not evidence against a stockholder, unless it is shown that he participated at the meetings in which the acts and proceedings which are admitted in evidence were passed. That is one proposition.

The other is that if it is admitted here or if it is intended here to show by these records—of course, I don't know the purpose for which they are put in—but if these records are offered for the purpose of showing this defendant is a stockholder, then we say, under the cases decided, it is not competent. We do not object to the records being shown by copy rather than by originals.

The COURT: I will rule that the record is competent so far as it relates to proceedings in respect to corporate affairs. On the question whether the fact of the stockholdership may be shown by the record, I reserve my ruling, if that is the question presented here. I don't understand that it is.

Exception taken by defendant.

(Mr. Bigelow reads portions of Exhibit "A" as follows, the whole exhibit being considered in for purposes of reference by either side.)

EXHIBIT "A."

* * * * * * *

BY-LAWS OF THE WESTERN INVESTMENT LOAN AND TRUST COMPANY OF TOPEKA, KANSAS.

Stockholders' Meeting.

SEC. 1. The regular annual meetings of the stockholders of this company for the election of directors shall be held at its office in the city of Topeka on the second Tuesday of February of each year at two o'clock p. m., of said day, due notice of the time, place, and object of which meeting shall be given by the secretary, by mailing a written or printed notice thereof to each stockholder at his or her last known place of residence at least thirty days in advance of said meeting, or by publishing a notice of said meeting in some newspaper in the city of Topeka at least thirty days in advance thereof.

The election shall be by ballot under the supervision of two tellers to be appointed by the meeting.

If for any reason the annual election of directors should not be held at such time the directors in office shall order an election to be held on some other day of which special election notice shall be given similar to that required for the annual meeting.

Special meetings of the stockholders shall be called by the president upon the request in writing of two-thirds of the mem-
51 bers of the board of directors, and notice of all such meetings and of the object thereof shall be given by the secretary in the same manner as is provided for other meetings.

Directors' Meetings.

The meeting for the organization of the new board of directors shall be held at the office of the president of the company, at 7.30 o'clock p. m. on the day succeeding their election.

The regular monthly meetings of the directors for the transaction of business shall be held on the second Tuesday of each month at 7.30 o'clock p. m.

Special meetings of the board may be called by the president at his discretion and shall be called by him whenever in writing requested so to do by any three members of the board.

A majority of the board shall constitute a quorum for the transaction of business, but a less number in attendance at any meeting may adjourn the same to a future time.

Officers.

The officers of the company shall be a president, a treasurer, and a secretary who shall be selected at the organization meeting of the board of directors from among their number, and such other officers as may be from time to time required for the prompt and orderly transaction of business, to be appointed or elected by the board of directors by whom their several duties shall be prescribed.

President.

The president shall preside at all meetings of the stockholders and of the directors, shall have general supervision over the affairs of the company; conduct all correspondence relating to the business of the company; draw orders upon the treasurer for all amounts approved by the loan committee, and perform such other duties as shall from time to time be required by the board of directors.

Treasurer.

The treasurer shall be the custodian of all moneys, stocks, bonds, notes, bills, or other property of the company. He shall pay all orders drawn upon him by the president in payment of vouchers approved by the loan committee, and shall perform such other duties as may from time to time be required by the board of directors. He shall give bond in such sum as the board of directors shall order.

Secretary.

The secretary shall keep a correct record of all business transactions of the company, and of all proceedings at stockholders' and

directors' meetings; shall have charge of all accounts, books
52 and records of the company, and give all notices of meetings as required by the by-laws; shall attest under the seal of the company when legally necessary all instruments in writing, executed by the company, and shall perform such other duties as the directors may from time to time require.

Loan Committee.

The loan committee shall consist of the president, treasurer, and one director to be selected by the board of directors every six months, to continue to act until succeeded, who shall have power to discount or purchase bonds, bills, notes, and other evidences of debt, and who shall at each regular meeting of the board of directors, make a report of all items discounted or purchased by them for the company since their last previous report.

Auditing Committee.

The board of directors at its organization meetings shall elect three of its members to serve as an auditing committee, whose duty it shall be to examine at least every three months the affairs of the company, compare its assets and its liabilities with the accounts of the general ledger; ascertain whether the accounts are correctly kept, and the condition of the company corresponds therewith, and whether the company is in a sound and solvent condition, and to recommend to the board such changes in the manner of doing business as shall seem desirable; the result of which examination shall be reported to the board at the next regular meeting thereafter.

Stocks.

Certificates of stock signed by the president and secretary shall be issued to stockholders, and the certificate shall state upon the face thereof that the stock is transferable only upon the books of the company; and when stock is transferred the certificate thereof shall be returned to the company and cancelled and a new certificate issued; a transfer book shall be provided in which all assignments and transfers of stock shall be made.

Transfers of stock shall not be suspended preparatory to the declaration of dividends; and unless an agreement to the contrary shall be expressed in the assignment, dividends shall be paid to the stockholder in whose name the stock shall stand at the date of the declaration of dividends.

The capital of the company may be increased by a majority vote of the stockholders at the annual meeting or at any special meeting ordered for that purpose by a two-thirds vote of the board of directors, due notice of said special meetings and the object thereof to be given by the secretary in the same manner as is provided for other special meetings.

Payments upon the stock of the company shall be as follows: 20

per cent. on April 10, 1888; 20 per cent. on May 10, 1888,
53 and the balance in instalments, as the board of directors may require, not exceeding 10 per cent. per month, at least twenty days' notice of any call to be given by the secretary to each stockholder.

Payment upon any increase of the capital stock shall be made in such amounts and at such times as the board of directors by resolution may order.

Votes.

All votes upon the election of officers or directors shall be by ballot.

All questions having reference either to a change in the number of directors of the company or in its corporate name, or to an increase in the capital stock of the company, or otherwise affecting the policy of the company, shall be decided by ballot, unless otherwise ordered by a two-thirds vote of the stockholders or directors present at the meeting, when such question is acted upon.

Seal.

The seal of the company shall have engraved around the outer edge thereof the words, "The Western Investment Loan and Trust Company," and in the center the word "Kansas."

Minutes of the Organization Meeting.

The directors of the Western Investment Loan and Trust Company met for the purpose of organization at the office of the Kansas national bank, of Topeka, on Wednesday evening, February 29, 1888, at 7.30 o'clock p. m., and there were present Messrs. M. A. Low, J. B. Bartholomew, J. W. Stout, S. L. Leavitt, R. M. Crane, L. L. Turner, and Samuel T. Howe, who came forward and took the oath of office as follows:

STATE OF KANSAS, *Shawnee County,* } ss:

We, and each of us, do solemnly swear that we will support the Constitution of the United States and the constitution of the State of Kansas, and faithfully discharge the duties of directors of the Western Investment Loan and Trust Company, so help us, God.

L. L. TURNER.
S. L. LEAVITT.
J. B. BARTHOLOMEW.
M. A. LOW.
J. W. STOUT.
R. M. CRANE.
SAMUEL T. HOWE.

Subscribed and sworn to before me, this 29th day of February, A. D. 1888.

GEO. S. HOVEY,
Notary Public.

[SEAL.]

My commission expires Sept. 30, 1891.

54 On motion, Samuel T. Howe was elected temporary chairman, and L. L. Turner temporary secretary.

Upon motion, by-laws for the government of the company were adopted, for a copy of which see pages 5 to 12 inclusive of this record book.

Upon motion of R. M. Crane, seconded by J. B. Bartholomew, Mr. L. L. Turner was elected president of the company, and upon motion of Mr. Low, seconded by Mr. Leavitt, Mr. Samuel T. Howe was elected treasurer and also secretary of the company.

Upon motion, Mr. J. B. Bartholomew was elected a member of the loan committee to serve with the president and treasurer, who are *ex officio* members of said committee.

Upon motion, Mr. Low, Mr. Leavitt, and Mr. Stout were elected members of the auditing committee.

Upon motion, the following resolution was adopted unanimously:

Resolved, That shareholders in this company be requested to make payment upon their stock, as follows:

On April 10, 1888, 20 per cent.

On May 10, 1888, 20 per cent.

and thereafter in such amounts as the board of directors may order, not exceeding 10 per cent. per month.

On motion, adjourned to meet Tuesday, March 6, 1888.

Minutes of Meeting Held March 6, 1888.

A meeting of the directors of the Western Investment Loan and Trust Company was held at the office of the company on Tuesday evening, at 7.30 o'clock p. m., and there were present Messrs. Low, Bartholomew, Crane, Stout, Turner, and Howe.

Minutes of the meeting held February 29, 1888, were read and approved.

TOPEKA, *Aug.* 7, 1888.

A special meeting of the board of directors of the Western Investment Loan and Trust Company was held at the office of the company pursuant to a call by the president on Tuesday of the seventh (7) day of August at 7½ o'clock p. m., and there were present Messrs. Low, Sandison, Crane, Walker, Turner, and Howe.

On motion it was unanimously resolved that Mr. R. M. Crane be elected assistant secretary with authority to perform the duties of the secretary of the company in its absence.

A resolution authorizing the officers of the company to guarantee the payment of obligations negotiated by the company was introduced, and adopted as follows:

Mr. FRINK: Now, if your honor pleases, I object to this resolution of the directors authorizing the guaranteeing of certain obligations; first, on the ground that it is not within the charter powers of the corporation, that it is *ultra vires*, in other words; and second, because it is a resolution of the directors and they had no power to
55 pass any such resolution. And if your honor pleases, I may want to add a word to my brief statement covering this. Perhaps it does now.

If not, I should want to add that the guaranty is not such a debt or due as is comprehended by the constitution or laws of the State of Kansas, which makes the stockholder liable for the debts of the corporation.

(Admitted and defendant excepts.)

Whereas, the directors of the Western Investment Loan and Trust Company after due consideration are of the opinion that the sale of investment securities belonging to the company can be greatly advanced by the company guaranteeing payment of the same,

Therefore be it resolved, That the president and secretary of the company be and they hereby are authorized to guarantee the payment of all securities negotiated by the company, by indorsing upon any such security one of the following forms of guarantee.

(Form 1.)

TOPEKA, KANSAS, —— —, *A. D.* 18—.

For a valuable consideration the Western Investment Loan and Trust Co. hereby guarantees payment of the within obligation on or before — days after maturity.

THE WESTERN INVESTMENT
LOAN AND TRUST CO.,
By —— ——, *President.*

Attest: —— ——, *Secretary.*

(Form 2.)

TOPEKA, KANSAS, —— —, *A. D.* 18—.

For a valuable consideration the Western Investment Loan and Trust Co. hereby guarantees payment of the within obligation, both principal and interest within — days after maturity.

THE WESTERN INVESTMENT
LOAN AND TRUST CO.,
By —— ——, *President.*

Attest: —— ——, *Secretary.*

(Form 3.)

TOPEKA, KANSAS, —— —, *A. D.* 18—.

For a valuable consideration the Western Investment Loan and Trust Co. hereby guarantee payment of the within obligation, both principal and interest on or before — days after maturity.

It is, however, understood by the parties to this contract, that the said guarantor shall have the right to take up or redeem this obligation at any time before maturity, by paying to the legal
56 holder the principal sum herein mentioned, with interest at the rate herein specified, computed to a day three months after the date of such redemption.

THE WESTERN INVESTMENT
LOAN AND TRUST CO.,
By —— ——, *President.*

Attest: —— ——, *Secretary.*

TOPEKA, KANSAS, *Dec.* 25, 1888.

A regular meeting of the board of directors of the Western Investment Loan and Trust Company was held at the office of the company at 7 o'clock p. m.

Present: Messrs. Bartholomew, Low, Washburn, Walker, Turner, and Crane.

On motion it was directed by unanimous vote, that the net earnings of the company to Dec. 31, 1888, be applied and disposed of as follows:

1st. That a dividend equal to 3 per cent. of the paid-up capital stock of the company be paid.

2d. That the sum of $1,000 be carried to surplus account.

3d. That the balance remaining be continued as undivided profits.

By a unanimous vote, Messrs. Walker and Washburn were elected members of the auditing committee in place of Messrs. Stout and Leavitt.

On motion the board adjourned.

Pursuant to notice heretofore given by the secretary the annual meeting of the stockholders of the Western Investment Loan and Trust Company was held at the office of the company at 2 o'clock p. m., on Tuesday the 12th day of February, A. D. 1889. The number of shares represented in person and by proxy were 986.

A meeting of the directors of the Western Investment Loan and Trust Co., elected at the annual meeting of said company was held for the purpose of organization at the office of the company on Tuesday, April 9, A. D. 1889, at eight o'clock p. m., and there were present Messrs. A. Washburn, O. E. Walker, M. A. Low, E. W. Sandison, J. B. Bartholomew, Samuel T. Howe, and L. L. Turner, who thereupon took upon themselves the oath of office.

On motion the board proceeded to the election of permanent officers for the ensuing year. Whereupon Mr. L. L. Turner being nominated for president by Mr. Low, and there being no other nomination, the rules were suspended, and the motion being put Mr. L. L. Turner received the unanimous vote of the members present, and was declared duly elected president of the board for the ensuing year.

Mr. S. T. Howe was nominated for permanent treasurer and secretary, and the motion being put under suspension of the rules, he re-

ceived the unanimous vote of those present, and was declared duly elected treasurer and secretary for the ensuing year.

57 Upon motion of Mr. Low, Mr. J. B. Bartholomew was elected a member of the loan committee to serve with the president and treasurer.

Upon motion Messrs. Low, E. W. Sandison, and O. E. Walker were elected members of the auditing committee. No further business appearing, the meeting on motion adjourned.

—— ——, *President.*

Attest: —— ——, *Secretary.*

A regular meeting of the board of directors of the Western Investment Loan and Trust Company was held at the office of the company on Tuesday evening, June 25, 1889, at 9 o'clock p. m. There were present Messrs. M. A. Low, Sam'l T. Howe, L. L. Turner, R. M. Crane, and O. E. Walker, constituting a quorum.

The following resolution was introduced by Mr. Low:

"Resolved, That a dividend of 4 per cent. on the capital stock of the company be declared and paid on the 29th day of June, 1889, and that 1 per cent. be placed to surplus account, and that the residue of the net earnings of the company be carried as undivided profits."

Upon motion of Mr. Low duly seconded, the resolution was unanimously adopted. No further business appearing, on motion the meeting adjourned.

Attest:

—— ——, *President.*

At a special meeting of the board of directors of the Western Investment Loan and Trust Company, held at the office of the company in Topeka, Kansas, on Tuesday, the 31st day of December, A. D. 1889, at 8.30 o'clock p. m., there were present Messrs. E. W. Sandison, J. B. Bartholomew, O. E. Walker, A. Washburn, J. W. Stout, L. L. Turner, and Sam'l T. Howe. On motion it was ordered that a dividend of 4 per cent. on the paid-up capital stock of the company be made, payable January 2, 1890.

On motion the meeting adjourned.

—— ——, *President.*

Attest: —— ——, *Secretary.*

Annual Meeting, February 11, 1890.

Pursuant to notice heretofore given by the secretary, the annual meeting of the stockholders of the Western Investment Loan and Trust Company, was held at the office of the company at 2 o'clock p. m., on Tuesday, the 11th day of February, A. D. 1890. The number of shares represented in person and by proxy were 1,405.

58 TUESDAY, *February 18th*, 1890.

The organization meeting of the directors-elect of the Western Investment Loan and Trust Company was held pursuant to notice at the office of the company, on Tuesday, February 18th, 1890, at seven and one-half o'clock p. m.

On motion, it was resolved to proceed to the election of permanent officers of the company for the ensuing year, and a ballot was taken. Mr. L. L. Turner received the votes of all the directors present for the presidency, and was thereupon duly declared elected to such office. Mr. Sam'l T. Howe received all the votes of the directors present for the offices of secretary and treasurer, and thereupon was declared duly elected to such position.

TOPEKA, KANSAS, TUESDAY, *July* 1, 1890.

At a regular meeting of the board of directors of this company this date, there were present M. A. Low, J. W. Stout, A. Washburn, J. B. Bartholomew, L. L. Turner, and Sam'l T. Howe.

On motion, the following resolution was adopted:

Resolved, That a dividend of three (3%) per cent. on the paid-up capital stock be declared out of the net earnings for the past six months, and that $1,500 be carried to surplus account.

On motion, meeting adjourned.

—— ——, *President.*

Attest: —— ——, *Secretary.*

TOPEKA, KANSAS, TUESDAY, *Dec.* 31, 1890.

At a meeting of the board of directors held this date, the following were present: A. Washburn, J. W. Stout, J. B. Bartholomew, Sam'l T. Howe, O. E. Walker, and L. L. Turner.

On motion of Mr. Washburn, it was resolved that no dividend be paid at this time.

No further business appearing, on motion the meeting adjourned.

—— ——, *President.*

Attest: ————, *Secretary.*

Annual Meeting, February 10, 1891.

Pursuant to notice heretofore given by the secretary, the annual meeting of the Western Investment Loan and Trust Company was held at the office of the company at 2 o'clock p. m., on Tuesday, the 10th day of February, A. D. 1891. The number of shares represented in person and by proxy were 1,153.

59 TOPEKA, KANSAS, *March* 10, 1892.

A special meeting of the board of directors of the Western Investment Loan and Trust Company was held at the company's office at 4:30 o'clock p. m. Present: Directors Wilson, Bartholomew, Washburn, Howe, Stout, Turner, and Troutman. L. W. Wilson, president, tendered his resignation as president and director of the company, and on motion, the resignation was accepted. James A. Troutman tendered his resignation as secretary and treasurer, which, upon motion, was accepted. James A. Troutman was elected president to fill the vacancy caused by the resignation of Mr. Wilson. O. J. Field was elected a director in place of L. W. Wilson resigned, and was also elected secretary and treasurer to fill the vacancy caused by the

resignation of Mr. Troutman. Upon motion of Mr. Howe, Mr. A. Washburn was authorized to dispose of any property connected with the creamery owned by the company that would not interfere with the sale or the use of the property as a whole.

On motion, the board adjourned.

JAMES A. TROUTMAN, *Secretary.*

Mr. FRINK: I object to Exhibit "B," because it is manifestly an incomplete copy of the stockholders' stock book, as the deposition of Mr. Troutman, I think, shows. I also object because they cannot show the defendant was a stockholder in this way.

The COURT: I suppose the purpose of this is to show that the stock was not transferred. I think that Exhibit "B" may be read for the purpose of showing any transfer.

Mr. FRINK: I want to say that taking all the books of the company together, it shows that he did transfer the stock and that a new certificate was issued. I think I ought to make that statement now, so Mr. Bigelow can understand it.

The COURT: Is there anything in the record that shows he had transferred his stock?

Mr. BIGELOW: There was a certificate made out to Mr. Kingsbury, but it was not put on the transfer book at all. The stub book of the certificates of stock shows that such a certificate was issued, but not the transfer book.

The COURT: You may put in your record, and Mr. Frink may then put in his. I do not think the fact that we have a certified copy, which appears to be a partial copy, would exclude a more fully authenticated copy.

60

EXHIBIT "B."

Edward Joslin, Keene, N. H.

1888.

Date.	Particulars.	Balance.	Credit.	Balance.
April 12		100	$1,000	$1,000
May 12			1,000	2,000
July 20			1,000	3,000
October 15			1,000	4,000
November 24, certificate No. 37			1,000	5,000

EXHIBIT "E."

The Western Investment Loan and Trust Company, August 26, 1891.

Resources:

Bills receivable	$223,899.62
Stocks	17,980.00
Premiums	1,564.00
Real estate	950.00
Judgments	3,000.00
Furniture and fixtures	120.50

Arkansas City Inv't Co.	$776.67	
J. B. Bartholomew	1,110.38	
J. H. Dennis	82.50	
Samuel T. Howe	63.33	
Pratt Co. national bank	279.99	
T. E. Simpson	216.67	
O. E. Walker	1.35	
		2,530.89
Expense	$3,525.16	
Telegraphing	30.34	
Accrued interest	1,112.39	
Profit and loss	357.67	
		5,025.56
Cash		342.64
		$255,413.21

Liabilities:

Capital stock		$104,600.00
Surplus		3,542.00
Commissions	$107.50	
Interest and discount	325.22	
		432.72
Bills redisc		128,212.80
Bills payable		16,500.00
Deposit		2,125.69
		$255,413.21

61 Deposits:

W. H. Conklin	$1,232.47
Watson Stewart	189.00
State Bank of Iwing	704.22
	$2,125.69

Mr. FRINK: I will read the following certificate, Defendant's Exhibit No. 1, attached to Troutman's deposition.

Mr. BIGELOW: We object to that. How is that admissible?

Mr. FRINK: We propose to show that a certificate was issued to Mr. Frederick Kingsbury by Mr. Troutman as president, and Mr. Gault as secretary, for 100 shares, and this was entered on the stub of the certificate book, which was a part of the records.

The COURT: You may show it.

DEFENDANT'S EXHIBIT No. "1."

Number 125. Shares, 100.

The Western Investment Loan and Trust Co. of Topeka, Kansas.

Capital stock, $250,000. Shares, $50 each.

This is to certify that Frederick E. Kingsbury is the owner of one hundred full-paid shares of the capital stock of the Western Investment Loan and Trust Co. of Topeka, Kans. Transferable on the books of the company in person or by attorney on the surrender of this certificate.

In witness whereof the president and secretary have [SEAL.] hereunto subscribed their names and affixed the seal of said company at Topeka, Kans., this 23rd day of June, 1894.

C. E. GAULT, *Secretary.*
JAMES A. TROUTMAN, *President.*

For value received, — do hereby sell, assign and transfer to —— —— — shares of the within-mentioned capital stock of the Western Investment Loan and Trust Co., and hereby constitute and appoint —— —— my attorney irrevocably, to transfer said stock on the books of said company, with power to substitute any person for that purpose.

Dated —— — 18—.

62 EXHIBIT "F."

Number 37. Shares, 100.

The Western Investment Loan and Trust Co. of Topeka, Kansas.

Capital stock, $250,000. Shares, $50 each.

This is to certify that Edward Joslin is the owner of one hundred full-paid shares of the capital stock of the Western Investment Loan and Trust Co. of Topeka, Kans. Transferable on the books of the company in person or by the attorney on the surrender of this certificate.

In witness whereof the president and secretary have [SEAL.] hereunto subscribed their names and affixed the seal of said company at Topeka, Kans., this 24th day of November, 1888.

SAMUEL T. HOWE, *Secretary.*
L. L. TURNER, *President.*

For value received, I do hereby sell, assign and transfer to Frederick E. Kingsbury, one hundred shares of the within-mentioned capital stock of the Western Investment Loan and Trust Co., and hereby constitute and appoint —— —— my attorney irrevocably,

to transfer said stock on the books of the said company, with power to substitute any person for that purpose.

Dated Keene, N. H., June 9, 1894.

EDWARD JOSLIN.

EXHIBIT "G."

Certificate No. 125.

For one hundred shares issued to Frederick E. Kingsbury; P. O. address, —— ——. Dated June 9th, 1894.

Transferred from Edward Joslin. Dated November 24th, 1888.

No. original certificate.	No. original shares.	No. of shares transferred.
37	100	100

Received the certificate —— —.

EXHIBIT "H."

Certificate No. 37.

For one hundred shares issued to Edward Joslin; P. O. address, Keene, N. H. Dated November 24th, 1888.

Transferred from —— ——. Dated —— —, 188–.

No. original certificate.	No. original shares.	No. of shares transferred.

Received the certificate —— —.

63 STATE OF KANSAS, } ss:
County of Shawnee, }

I, Robert Stone, a notary public within and for the county of Shawnee and State of Kansas, do hereby certify that James A. Troutman was by me first sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed, as above set forth, was taken in shorthand and subsequently reduced to writing in my presence, by Cale R. Jones, who is not interested in the suit, or in any of the parties to said suit, in the presence of the witness, and was subscribed to by the witness in my presence, and was taken at the office of Troutman & Stone, my office, in the Crawford building, in the city of Topeka, in the county of Shawnee, and in the State of Kansas, as specified in the annexed agreement; that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit.

Witness my hand and notarial seal at Topeka, in said county, this 8th day of June, A. D. 1898.

ROBERT STONE,
Notary Public.

My commission expires April 25th, 1902.

[SEAL.]

Deposition of Edward Joslin.

(Stipulation for taking omitted.)

United States Circuit Court, District of New Hampshire.

H. L. WARD, Treasurer,
v.
EDWARD JOSLIN.

STATE OF NEW HAMPSHIRE,
County of Cheshire, } ss:

At the office of Hiram Blake, in Keene, in said county, the within-named Edward Joslin and Frederick E. Kingsbury, on the 20th day of December, A. D. 1898, personally appeared before me, a notary public in and for the State aforesaid, and made oath that the depositions by them subscribed, contain the truth, the whole truth, and nothing but the truth, relative to the cause for which they were taken.

Taken at the request of the defendant, to be used in the court aforesaid in a plea wherein H. L. Ward, treasurer, is plaintiff, and said Joslin is defendant, pursuant to the annexed stipulation. The taking of the same was begun at said office at 4 o'clock in the afternoon on said day, and there completed.

Hiram Blake appeared for the defendant and E. L. Waterman for the plaintiff.

ORVILLE E. CAIN,
Notary Public.

Fees of notary, paid by plaintiff, $6.00.

ORVILLE E. CAIN,
[SEAL.] *Notary Public.*

64 Direct examination by HIRAM BLAKE:

EDWARD JOSLIN, being first duly sworn, deposes and says:

Int. 1. State your name, age, residence, and occupation?

A. My name is Edward Joslin; age, 88 years; city of Keene; occupation, am much retired from any.

Int. 2. State whether or not you owned any stock in the Western Investment Loan and Trust Co. of Topeka, Kansas?

A. I did own some, but I transferred it years ago.

Int. 3. When did you purchase said stock, what was the number of shares, and the par value of each share?

A. I purchased it in '88.

Int. 4. In 1888?

A. Yes, 1888. Purchased one hundred shares, par value $50 per share.

Int. 5. If you have sold and transferred said stock, to whom did you transfer it?

A. I transferred it to Frederick E. Kingsbury.

Int. 6. What was the date of said transfer? Give the circumstances of the transaction.

A. It was transferred June 9th, 1894.

Int. 7. The latter part of it, the rest of the question, if there is any circumstances connected with it, if there is anything else, why —?

A. I sent the stock with a certificate of stock which I owned in the national bank, Kansas national bank, to the cashier, A. Washburn, and requested him to transfer the national bank stock to Harry T. Kingsbury, and the certificate in the loan company to Frederick E. Kingsbury, and send new certificates to me.

Int. 8. Have you a copy of the letter you wrote to Mr. Washburn, the cashier of the Kansas national bank?

A. I have.

Int. 9. And, if so, will you please produce it, mark it "Exhibit A," and attach it to your deposition as a part of the same?

A. Yes, I will produce it.

(Copy of letter is hereto annexed, marked "Exhibit A," and made a part hereof.)

Int. 10. Did you get a reply to your letter of June 9th, 1894, to A. Washburn, cashier of the national bank, and, if so, have you the letter in your possession?

A. I received an answer but I have mislaid it and am unable to find it.

Int. 11. Have you searched for the letter?

A. I have, and am unable to find it.

Int. 12. You may state the contents of said letter, and whether it contained anything else inclosed?

A. Mr. Washburn sent a certificate transferred in the Kansas national bank to —.

Int. 13. A certificate of stock in what bank?

A. In the Kansas national bank, transferred to Harry T.
65 Kingsbury, and stated that the president of the Western Investment and Loan Company was away from home, and as soon as he returned home he would get the certificate in the loan company transferred and send it to me.

Int. 14. Anything else? State when the new certificate of stock in the Western Investment Loan and Trust Company was received by you?

A. It was received about the 25th of June, 1894.

Int. 15. The stock in the loan company, you had reference to?

A. Yes, in the Western Investment Loan and Trust Company.

Int. 16. You received it about June 25, 1894, did you?

A. Yes, sir.

Int. 17. Well, have you Mr. Troutman's letter (Troutman was the cashier, or president, rather), have you Mr. Troutman's letter in which he sent the stock, and, if, so, will you produce it, attach it to your deposition, and mark it as "Exhibit B," as a part thereof?

A. Yes.

(Letter attached and marked "Exhibit B," as part hereof.)

Int. 18. What was the number and date of this certificate, and to whom was it issued?

A. I cannot say what the number was. It was dated June 23d, 1894.

Int. 19. State where this certificate of stock is, if you know?

A. Well, I gave it to Mr. Blake, by his request, to be used in evidence in this case, and never have seen it since.

Int. 20. What was your object in transferring your stock in said company at the time you transferred it?

A. Well, I had two objects. I owned stock in the Davidson In-Investment Company of Wichita, Kansas, and that company had failed, and I was sued on my double liability, double stock liability—exceeding the value of my liability, the amount of my liability—and to avoid expense of defending suits and trouble, I transferred this stock, which I considered there was a value in it, and I had rather the value of the stock had go to my family rather than to expend it in defending suits.

Int. 21. State whether or not you transferred this stock to avoid suits on your liability on this particular stock?

A. I did not. I considered there was a value in the stock and I transferred it to save the trouble and expense of defending suits.

Int. 22. Do you mean suits which you have referred to before?

A. Yes, I was fearing that this might be attached and I wanted to save the trouble and expense of defending suits. I had already been sued for my liability in the Davidson Investment Co.

Int. 23. If you had any knowledge, at the time of such transfer, that the Western Investment Loan and Trust Company was financially embarrassed, or insolvent, state what it was?

66 A. Well, I considered the company good. I had received every year statements from them, and the statements showed that the company was financially good, and I transferred it to save the values there was in it and the trouble of defending suits.

Int. 24. Did you receive dividends on said stock, and, if so, up to what time?

A. They paid dividends, I think, every year, up to, I think, '93.

Cross-examination by E. L. WATERMAN:

X Int. 1. When the company ceased to pay dividends, you began to think there was some trouble with it, did you not?

A. Well, the dividends, I think, were paid up to the time I was sued on it; hadn't been a long space, if I remember right.

X Int. 2. You wasn't sued until January, 1897, were you?

A. I was sued—let me see—no, I was mistaken, the dividends was paid up to about '93, the suit was brought in '97, anyway about '97. I don't know, as I have no memorandum.

X Int. 3. My question was, whether or not you didn't begin to think there was trouble with the company when it ceased to pay dividends?

A. Oh, well, up to 1894, the time I transferred it, there hadn't

been a long space with no dividends paid. No, it didn't occur to me, I hadn't made—I supposed the company was financially good.

X Int. 4. Will you please answer the question, whether you did not suspect there was trouble with the company when it ceased to pay dividends?

A. Well, really, there hadn't been any cessation. I was—I think there had been a dividend paid within about a year at the time I transferred it.

X Int. 5. By direction of Mr. Waterman, notary reads last question.

A. Well, if I remember right, there hadn't more than time expired that the dividend became due. Had no occasion to become alarmed. Really, they hadn't passed—hadn't given me notice that they had passed any dividends. I had had no notice that there was dividend passed.

X Int. 6. Have you any memorandum or statement of the last dividend received by you from the company?

A. I have not, couldn't tell last one. Nigh as I can remember, it was paid up to '93. I don't remember now the dates that they paid dividends, the months that they paid them.

X Int. 7. Did you keep letters received by you from the company inclosing dividends to you?

A. I do not, no, sir. Well, in general, I have no occasion for those letters.

67 X Int. 8. If the company failed to pay dividends for more than a year, you did suspect there was trouble, did you not?

A. Well, when I have notice that they have suspended, or passed a dividend, of course there was trouble.

X Int. 9. If, in fact, the company failed to send you dividends at the usual times, you suspected there was trouble, did you not?

A. Well, I should if they failed to send it and I had notice that they had passed it, but I had no such notice on this company.

X Int. 10. Can you produce any memorandum, book, statement, letter, or other paper, showing that you received any dividend from this company as late as 1893?

A. I have not, no letters and no memorandum of the payment of those dividends.

X Int. 11. Is it not true that the last dividend received by you was declared July 1, 1890, and was for three per cent.?

A. I could not say, I do not remember.

X Int. 12. Were the dividends annual or semi-annual?

A. I cannot say, I do not remember.

X Int. 13. Do you mean to say that you do not remember now whether the last dividend was declared in 1890 or '93?

A. No, I do not, I do not remember.

X Int. 14. If, in fact, the last dividend was declared and sent you July 1, 1890, you did suspect, did you not, before you transferred this stock, June 9, 1894, that there was trouble with that company?

A. Well, I do not remember when they sent the last dividend. I

never had received any notice from them that there was any trouble. I supposed the company was a-going along.

X Int. 15. My question states that if, in fact, the last dividend was declared July 1, 1890, you must have suspected something wrong before June, 1894, isn't that a fact?

A. Well, the fact is——

X Int. 16. I shall have to repeat these questions until you answer them, Mr. Joslin.

A. Well, I would say that any company that passed its dividend and I have knowledge of it, I should suspect there was something wrong.

X Int. 17. If it passed dividend from July, 1890, until June, 1894, you would strongly suspect there was something wrong, would you not?

A. Well, if they gave me notice that they passed dividends and could not pay it, I would think there is something wrong but, frequently, companies go along, pass dividends, and put it in surplus.

X Int. 18. Did you understand that this company was passing dividends and placing it to surplus?

A. No, sir.

X Int. 19. Will you testify, from any means of knowledge
68 which you have, that you received a dividend after July, 1890?

A. I could not swear that I did. I do not remember but it is my impression—it is my impression—that I did, but I might be mistaken.

X Int. 20. You are—you were familiar, were you not, with the methods of doing business in stock companies?

A. Yes, sir.

X Int. 21. And had owned stock in many other companies?

A. Yes, sir.

X Int. 22. Have you in your possession letters which you received from this company?

A. I do not know that I have, only the letters that I have mentioned in my testimony.

X Int. 23. Only two, only two letters?

A. I believe there is only two that I have reference to.

X Int. 24. So you have, really, only one letter from that company, that is the Troutman letter?

A. Yes, the letters that I received with the dividend, that was settled; they was no account to me. I had letters enough to keep without them and threw them into the waste-basket.

X Int. 25. Have you preserved any letters from that company except the letter from Mr. Troutman inclosing the certificate of stock to F. E. Kingsbury?

A. I do not recollect that I have.

X Int. 26. Have you kept on any book of account your dealings and transactions with that company?

A. No, sir.

X Int. 27. Have you kept any account of dividends, when received?

A. No, sir.

X Int. 28. When you made this transfer of stock was the suit against you on your Davidson Investment Company stock closed up and ended?

A. No, sir.

X Int. 29. It was still pending, was it?

A. They was still suing me, I transferred it to stop them.

X Int. 30. Transferred what to stop them?

A. The loan and trust company stock.

X Int. 31. You mean the Western Investment Loan and Trust Company stock?

A. The Western Investment Loan and Trust Company stock, to stop the expense of defending suits.

X Int. 32. You transferred the stock then to avoid being sued upon it?

A. What say?

X Int. 33. You transferred this stock then to F. E. Kingsbury to avoid being sued upon it on your double liability?

A. On my double liability on the Davidson stock and not to avoid any double liability on this stock. This stock, I had really had no notice that it was in any trouble.

X Int. 34. In any suit against you on the Davidson Com-
69 pany stock, had any process been served to attach the stock in the Western Investment Company?

A. No.

X Int. 35. Had you received any intimations that they were about to attach it? Had you received any intimation that any one was about to attach this stock?

A. No, I had no intimation, only they was attaching my stock, my property, around in different places, and I transferred this to shut them off.

X Int. 36. But they had already sued you on the Davidson Company stock?

A. They had sued me—had several suits, on the Davidson Company stock; had sued me more than the amount of my liability, and I thought I would stop them.

X Int. 37. Did they, in fact, bring any suit against you on the Davidson Company stock after you made this transfer?

A. Well, I don't remember now. I think there was a suit after I transferred this.

X Int. 38. Can you state in whose favor that suit was?

A. No, I could not give the name; it troubles me to remember names.

X Int. 39. Did you receive any consideration for the transfer of this stock?

A. No, sir, didn't ask any.

X Int. 40. When did you deliver the certificate of stock to Mr. Blake, your attorney?

A. Well, it was some time this year, at the time the deposition was taken at Topeka, I cannot say what month that was.

X Int. 41. Had you retained it in your hands up to that time?

A. Yes.

X Int. 42. Ever since Mr. Troutman sent it to you?

A. Yes, I had a safety box in the bank, and Kingsbury told me to put this stock certificate in with my papers, and keep it.

X Int. 43. You always had kept it, had you not?

A. I have kept it ever since it was transferred, with my papers in the bank.

X Int. 44. At the time the transfer was made, did Mr. Kingsbury have visible attachable property?

A. Well, he——

X Int. 45. Did he?

A. Yes—no, he hadn't to any amount.

X Int. 46. And has not now, has he?

A. Not a great deal.

X Int. 47. Has he any that you know of?

A. Well, some little things; not any large amount.

X Int. 48. Didn't Mr. Waterman, attorney for the plaintiff in this case, have some conversation with you previous to the commencement of this suit, in relation to the transfer?

A. Yes, he did.

X Int. 49. Did you not then tell him that you had transferred this stock to one Harry Kingsbury?

A. I think not; if I did I made a mistake. Sometimes we miscall names. If I did so, it was a mistake.

70 X Int. 50. And did you not, in making the transfer on the back of the original certificate, write the name "Harry" first, and then scratch it out with the pen and write "Frederick E."?

A. I guess I did, but through mistake. I put Harry's name on to the wrong certificate, and then corrected it.

X Int. 51. And did you not also write the word "thirty" at first on the back of the original certificate and erase that and write "one hundred?"

A. I don't know; I think not.

X Int. 52. Did you, at first, contemplate transferring only thirty shares of that stock?

A. I contemplated transferring the whole.

X Int. 53. Why did you write "thirty" on the certificate?

A. I don't remember as I wrote it; some mistake in it, if I done it. There wan't but thirty shares of that stock, was there? They cut the stock down there two-fifths, I believe, from $5,000 on that bank, cut it down to $3,000, I believe, the bank stock. You mean the bank stock or the loan stock?

X Int. 54. I am inquiring about the loan stock.

A. Oh, well, that never was cut down.

X Int. 55. Did you not keep yourself well posted in regard to the condition of this company from time to time?

A. No, I did not pay a great deal of attention to it. I wan't very well posted in it. They sent me statements occasionally; those statements showed the company to be good. I had no reason to disbelieve them.

X Int. 56. You did not believe the company was good if it paid no dividends, did you?

A. Might be; couldn't say. I have known good companies that didn't pay dividends.

X Int. 57. There were other people with whom you are acquainted here in Keene who held stock in this same company, were there not?

(Objected to by the defendant as irrelevant.)

A. Well, I never had any— Yes, I think there was one man in town that had a little stock in the same company, I have learned since.

X Int. 58. Were there not several?

(Same objection by defendant.)

A. I don't know of but one.

X Int. 59. Who was that?

(Same objection by defendant.)

A. William Briggs. I learned, after the company stopped, that Mr. Briggs had some stock. Never had any conversation with him in relation to it.

71 X Int. 60. Where were the suits pending against you with reference to the Davidson Company stock?

A. I do not understand you.

X Int. 61. Where were the suits pending against you in reference to the Davidson Company stock?

A. I could not locate them. They were brought by attorneys down at Wichita.

X Int. 62. Did you go there to defend the suits?

A. No, sir, done by an agent.

X Int. 63. Who was your agent in Kansas?

A. Mr. Clapp—L. W. Clapp.

X Int. 64. Have you ever corresponded with the company or any of its officers since you made the transfer to Kingsbury?

A. I have.

X Int. 65. With whom?

A. The president.

X Int. 66. Mr. Troutman?

A. Troutman, yes.

X Int. 67. Have you any letters received from him since that time?

A. I have one.

X Int. 68. Will you produce it?

A. Yes. I wrote him inquiring wanting him to inform me in relation to the condition of the company, and he answered my letter.

(Defendant produces letter referred to and, at his request and with the consent of the plaintiff, it is hereto annexed, marked "Exhibit C," and made a part hereof.)

X Int. 69. This is the only letter you received from the company, or its officers, since June 9, 1894?

A. No, sir. When he sent the certificate of stock to me—when I acknowledged the receipt of the stock, and I asked him to inform me the condition of the company, and he sent me that letter.

X Int. 70. Have you ever made any further inquiries in regard to the condition of the company?

A. I have had no correspondence with the company since.

X Int. 71. When the company ceased to pay dividends, did you not write to them inquiring the reason?

A. No, I don't remember—I don't think I ever did.

X Int. 72. Mr. Joslin, as a business man and one having had large experience in the ownership of stock in stock companies, did you not believe that company was in financial trouble previous to June, 1894?

A. No, I don't think it was deeply in trouble. I had no reason—their statement would cut that off; the statements showed that they was all right.

X Int. 73. The lack of dividends didn't show it, did they?

A. I don't remember how large dividends they paid. I had a good many stocks around in those companies, different com-
72 panies, and that particular company, I don't remember—couldn't say what dividend they paid at any time.

X Int. 74. When they ceased to pay dividends, in 1890, and didn't resume paying up to June, 1894, what did you think of their financial condition?

A. I don't remember as I had any thought about it. All companies at that time were oppressed, and I supposed that they called that they was not in a failing condition, but their statements showed that they was all sound.

X Int. 75. When you say that all companies at that time were oppressed, do you mean they were being sued?

A. Oh, no, but their business was pressed; began to come on them, you know. In '93 and '94 all business went down, and those companies had to fare equally as hard as any other companies.

X Int. 76. The condition of business was such in 1893, was it not, that you then understood that all such companies in the West were in financial straits?

A. Knew that the business was oppressed; western companies or banks stopped paying dividends; business was oppressed.

X Int. 77. Did you not know that all loan companies of this character in the State of Kansas, were in about the same condition,—financially embarrassed?

A. No, they wan't all in the same condition. There is one loan company in the West now that is doing a good business now, doing a good business.

X Int. 78. What is the name of that company?

A. I think the Western Loan and Trust Company—no, the Iowa Loan and Trust Company—I cannot speak the name—I don't know the name.

X Int. 79. I inquired about Kansas companies.

A. Well, I think that is in the State of Kansas. But then, as a general thing, these companies had to succumb, but they didn't all.

X Int. 80. And, as a general thing, they had to succumb as early as 1893?

(Objected to as irrelevant by defendant.)

A. They commenced in 1893, and some before that.

X Int. 81. And you knew, did you not, that suits were being brought against such companies in Kansas?

(Defendant objects as irrelevant.)

A. The Davidson Investment Company there brought suit against me——

X Int. 82. I am asking you about suits against the companies themselves.

A. I couldn't say about that.

73 Redirect examination by Mr. BLAKE:

R. Int. 1. State whether you have assisted your children and grandchildren so far and to what extent.

(Plaintiff objects as irrelevant.)

A. I have assisted them to their school expenses, and assisted them other ways when they wanted or needed.

R. Int. 2. To what extent, if you can tell?

A. Well, I don't know about that going to any particular extent. I have helped them a good deal.

R. Int. 3. Well, in what way?

A. Well, paying their school expenses, and put a little money in the savings bank for them, encouraging them along, and any time they needed any help, I took hold and helped them.

R. Int. 4. How many grandchildren have you living?

A. Have five.

R. Int. 5. State whether or not you have assisted all of them.

A. Yes, I have.

R. Int. 6. In a financial way?

A. Paying their school expenses and that kind of way, helping of them along getting an education.

R. Int. 7. Helped them to business?

A. Yes, have helped them some, some of them in business.

Recross-examination by Mr. WATERMAN:

R. X Int. 1. Have you ever transferred any other stock to Frederick E. Kingsbury except this stock?

A. Yes, I transferred some stock in Kansas City, the company called Midland Company.

R. X Int. 2. A similar loan company?

A. No, it was a piece of land that was bought at the time they

was booming Kansas for house lots. I owned some stock in it and I transferred that to him.

R. X Int. 3. When did you transfer it?

A. Same time I did this other.

R. X Int. 4. And for the same reason?

A. Same reason, and that has come to be worth just about as much as the loan company.

EDWARD JOSLIN.

FREDERICK E. KINGSBURY, being first duly sworn, deposes and says:

Direct examination by HIRAM BLAKE:

Int. 1. State your name, age, residence, and occupation.

A. Frederick E. Kingsbury; 31 years of age; live in Keene; teller in Keene national bank.

74 Int. 2. State whether or not you are related to Edward Joslin of said Keene, and how you are related to him.

A. I am his grandson.

Int. 3. Will you state whether or not your grandfather, Edward Joslin, transferred any stock in the Western Investment Loan and Trust Company of Topeka, Kansas, to you?

A. He did.

Int. 4. When did he transfer said stock to you?

A. It was in June, 1894.

Int. 5. State, if you can, the number of shares and the par value of each share.

A. There were 100 shares at $50 par value each.

Int. 6. When did you become aware that Mr. Joslin had, or was about to transfer said stock to you? State all the circumstances.

(Plaintiff objects to what Joslin said.)

A. He told me that he had transferred, or was about to transfer some Kansas stock to me, and some time afterwards he brought me the certificate, which I looked over and accepted. We were in the bank at the time, and I had no place to put it, as I had no valuable papers at that time, and it was thought best to put it in the box which he kept in the bank vault for safe keeping.

Int. 7. Did he do so?

A. He did.

Int. 8. Do you still hold said stock?

A. I do, and I have never transferred it nor any part of it.

Int. 9. What did you pay for said stock?

A. I paid nothing. He simply said that he had made this over to me—turned it over to me.

Cross-examination by E. L. WATERMAN:

X Int. 1. Did you then know that Mr. Joslin owned stock in several Kansas companies?

A. Yes, sir.

X Int. 2. Did you know he had been sued on account of stock held by him in Kansas companies?

A. I don't think I did at that time.

X Int. 3. When did you learn that fact?

(Defendant objects as irrelevant.)

A. Well, I could not say just when I did but, of course, I afterwards knew that there was more or less trouble out there.

X Int. 4. You knew, did you not, that Kansas loan companies had generally been in financial trouble for some time?

A. I didn't at that time; I didn't know that until afterwards.

X Int. 5. Was you not posted on the general financial condition?

A. Well, at that time, we knew that there was a business panic on, but what I knew was more particularly in what we were directly interested.

75 X Int. 6. Did you not know that the panic struck investment companies in the West very severely?

A. I didn't know that until afterwards.

X Int. 7. And did you not know that nearly all, in fact all, loan companies in Kansas succumbed to that panic in 1893, or previous to that time?

A. No, I did not know that then.

X Int. 8. Then you didn't keep yourself informed as to the financial situation of the country generally, did you?

A. No, I did not, at that time.

X Int. 9. Was you not at work in this bank at that time?

A. Yes, sir.

X Int. 10. Did you make any inquiries of Mr. Joslin as to the standing of this company or the value of the stock?

A. No, sir; simply that I noticed the par value of the stock at the time; that was all.

X Int. 11. Did you see the original certificate of stock?

A. I don't remember that I did.

X Int. 12. Did you know whether there was more than one certificate or not?

A. No, I don't think I did. I am not clear on that point.

X Int. 13. Did you ever see more than one certificate?

A. Well, I don't think that I ever did, although I cannot remember about that part of it. We had other transfers at that time. I don't remember just what that was.

X Int. 14. Did he make other transfers of Kansas stock at that time?

A. I think he did.

X Int. 15. Do you know to whom?

A. Well, he made transfers to me of this Midland stock that he speaks of; also a bank stock in Kansas.

X Int. 16. Did you have the certificate of bank stock?

A. Yes, it was about the same time. Both stocks, both certificates I have he showed me at the same time.

X Int. 17. Have you ever held, or retained in your possession, the

certificates of stock in either or any of those companies since the transfer?

A. Only as I looked them over.

X Int. 18. Will you swear that you took them and looked them over?

A. Yes, sir.

X Int. 19. Where were you when you looked them over?

A. It was in the Keene bank.

X Int. 20. And now you cannot state whether there was more than one certificate or not?

A. You mean in the reissue?

X Int. 21. Yes.

A. There certainly was one certificate.

76 X Int. 22. Do you remember of seeing any other certificate?

A. You mean in my name?

X Int. 23. Yes, how many?

A. I cannot remember about that.

X Int. 24. Now, as you say, Mr. Joslin has kept possession of those certificates ever since?

A. Well, I have not seen them since, I suppose he has.

X Int. 25. Did you ever correspond with either of the companies or the bank, the stock of which you say was transferred to you by Mr. Joslin?

A. I think I might have written to the bank at one time. I never have on this particular stock.

X Int. 26. Will you testify that you ever wrote the bank?

A. No, I am not certain of that point. I can find out. Mr. Faulkner was there at that time.

X Int. 27. Did you ever receive any letters from either of those companies or from the bank?

A. Yes.

X Int. 28. Have you those letters?

A. I have not, no, I know I have not.

X Int. 29. Did you, at the time of the transfer, have any visible attachable property?

(Objected to by the defendant as incompetent, irrelevant, and immaterial.)

A. Practically not much of anything, except a few things.

X Int. 30. Did you have any property that was attachable as you understood it?

A. Well, practically not any. That is, I had a savings-bank deposit. I cannot remember just what I did have at that time, not very much, wasn't very much.

X Int. 31. How much in all?

A. Well, I don't know.

X Int. 32. Have you any visible attachable property at the present time?

(Defendant objects as irrelevant.)

A. No, I don't think I have.

X Int. 33. Is Harry Kingsbury your brother?

(Defendant objects as irrelevant.)

A. Yes, sir.

Deponent Edward Joslin makes the following correction of his answer to recross-interrogatory 1: A. "I transferred some stock in Wichita, the company called the Midland Company," instead of "Kansas City."

O. E. CAIN,
Notary Public.

[SEAL.]

77 United States Circuit Court, District New Hampshire.

H. L. WARD, Treasurer,
vs.
EDWARD JOSLIN.

DEFENDANT'S EXHIBIT "B" TO DEPOSITION EDWARD JOSLIN. O. E. Cain, Notary Public.

TOPEKA, KANSAS, *June* 23, 1894.

Edward Joslin, Esq., Keene, N. H.

DEAR SIR: I enclose herein certificate number 125 for 100 shares of the capital stock of the Western Investment Loan and Trust Co., issued to Frederick E. Kingsbury in lieu of certificate number 37, issued to you and assigned by you to said Kingsbury. Please acknowledge receipt.

Yours truly, JAMES A. TROUTMAN, *President.*

United States Circuit Court, District New Hampshire.

H. L. WARD, Treasurer,
vs.
EDWARD JOSLIN.

DEFENDANT'S EXHIBIT "C" TO DEPOSITION EDWARD JOSLIN. O. E. Cain, Notary Public.

TOPEKA, KANSAS, *June* 29, 1894.

E. Joslin, Esq., Keene, N. H.

DEAR SIR: I have your favor of the 27th inst., acknowledging receipt of certificate number 125 for one hundred shares of the capital stock of the Western Investment Loan and Trust Co., also requesting a statement of the condition of the company. I enclose herein a statement of the company's condition on the 16th of December last. The liabilities of the company have been considerably reduced since that date. I will have a new statement made soon and will send you one. The affairs of the company are being closed up as rapidly as these dull times will permit and it is being

done with very little expense to the company. The company guaranteed a large amount of commercial paper which was not paid by the makers at maturity. Suits have been brought against the company upon these guarantees, and judgments aggregating a large amount have been rendered. In most of these cases I think the original makers of the paper will be able to take care of the obligations and save the company from loss. If there is any special information you desire, I will be glad to communicate with you farther.

Yours truly, JAMES A. TROUTMAN.

78 United States Circuit Court, District New Hampshire.

H. L. WARD, Treasurer,
vs.
EDWARD JOSLIN.

DEFENDANT'S EXHIBIT "A" ATTACHED TO DEPOSITION OF EDWARD JOSLIN. O. E. Cain, Notary Public.

KEENE, N. H., *June* 9, 1894.

A. Washburn, cashier, Topeka, Kansas.

DEAR SIR: I send you enclosed a certificate of thirty shares of stock in the Kansas National Bank of Topeka, transferred to Harry T. Kingsbury. I wish you to send me a new certificate for thirty shares of stock in the name of Harry T. Kingsbury.

I also enclose a certificate for one hundred shares of stock in the Western Investment Loan and Trust Co. Will you please get a new certificate for same amount in the name of Frederick E. Kingsbury, and send to me with the bank certificate.

Yours truly, E. JOSLIN.

Mr. BIGELOW: I wish now to read a certified record of the judgment in the case of H. L. Ward, treasurer, *v.* the Western Investment Loan & Trust Company and others.

Mr. FRINK: I object to the admissibility of this judgment, because it appears from the transcript of record that the judgment against the Western Investment Loan & Trust Company was by default, the said Western Investment Loan & Trust Company not having answered to said action, and it appears from the transcript of record of said judgment, that the claim against the said Western Investment Loan & Trust Company upon which said judgment was founded, was upon a guarantee by said company of the debt of a third person, and no consideration therefor appears in the transcript of record.

Second. I object because it appears from the transcript of record that the claim against the said Western Investment Loan & Trust Company, upon which said judgment was founded, was not such a due of the corporation or debt of the corporation for which, under the constitution and laws of Kansas, a stockholder is liable to an amount equal to the stock owned by him. That is, we intend to

raise by this objection the question that a mortgage is not a debt due, such as the statute contemplated.

(Mr. Bigelow reads record.)

79 *Record of Judgment.*

In the District Court of Smith County, Kansas.

H. L. WARD, Treasurer, Plaintiff,
vs.
S. S. HITE, MARY L. HITE, C. F. JILSON, as Trustee; The Western Investment Loan & Trust Company, a Corporation; Joseph Galbrath, M. C. Galbrath, John Mollison, Sarah Mollison, Mrs. E. E. Hickman, John N. Walker, and Calista Walker, Defendants. } Transcript.

Be it remembered,—that in the above-entitled case, in the above-entitled court, the following petition was filed, which is hereinafter set forth, and in said action the proceedings were had as hereinafter appears:

"In the District Court, Smith County, State of Kansas."

H. L. WARD, Treasurer, Plaintiff,
vs.
S. S. HITE, MARY L. HITE, C. F. JILSON, as Trustee; The Western Investment Loan & Trust Company, a Corporation; Joseph Galbrath, M. C. Galbrath, John Mollison, Sarah Mollison, Mrs. E. E. Hickman, John N. Walker, and Calista Walker, Defendants. } Petition.

The said H. L. Ward, treasurer, plaintiff, complains of said defendants, and for cause of action says:

That said The Western Investment Loan & Trust Company is a corporation duly organized and existing under and by virtue of the laws of the State of Kansas.

1. That on the 12th day of September, 1888, the said S. S. Hite and Mary L. Hite executed and delivered to J. E. Ethell their certain promissory note of that date, whereby for value received, they promised to pay to the order of J. E. Ethell on the 14th day of September, 1892, the principal sum of two thousand five hundred dollars, with interest thereon at the rate of seven per cent. per annum from date until paid, payable semi-annually, according to the tenor of eight interest coupons, bearing even date herewith, thereto annexed; executed and delivered by the said S. S. Hite and Mary L. Hite, at the same time with said principal note; said principal and interest notes to draw twelve per cent. interest from date after
80 maturity, and payable at the office of the Western Investment Loan & Trust Company, in Topeka, Kansas.

That said S. S. Hite and Mary L. Hite promised and agreed in and by the terms of said note that if default should be made in the payment of any part of the interest after the same should become

due and payable, then that said note should, at the option of the legal holder thereof, become due and collectible without further notice.

That afterwards, and before the maturity of said note, the said J. E. Ethell, for value received, endorsed, transferred, and delivered the said note to this plaintiff, who thereby became, and ever since has been, and now is the legal owner and holder thereof. A true copy of said note, with all the endorsements thereon, and all unpaid interest coupons, with all the endorsements thereon, being interest coupons Nos. 5, 6, 7, 8, is hereto attached, marked Exhibit "A," and made a part of this petition.

That said S. S. Hite and Mary L. Hite wholly failed and neglected to pay said principal note, or any interest thereon, when the same became due, except interest coupon notes Nos. 1, 2, 3, and 4, but have made default thereon, which default has continued to this day. That by reason of said default the said plaintiff has elected to declare and does now declare the said principal and interest notes due and payable.

That there is now due said plaintiff on said indebtedness notes and mortgage, the sum of $2,500, with interest thereon at the rate of 12 per cent. per annum from the 12th day of September, 1888, less the sum of $350, heretofore paid on account of interest, which sum of money and interest plaintiff claims.

2. For his second cause of action, plaintiff fully adopts and makes a part hereof all the allegations and averments set forth in plaintiff's first cause of action, and says:

That at the time of the endorsement of said notes to this plaintiff (reference being had to the note described and set forth in plaintiff's said first cause of action) the said The Western Investment Loan & Trust Company, for value and in writing, guaranteed the payment of the same in words and figures following, to wit:

TOPEKA, KANSAS, *May 9th*, 1889.

For valuable consideration, the Western Investment Loan & Trust Company hereby guarantees payment of the within obligation, both interest and principal at maturity.

(Signed) THE WESTERN INVESTMENT LOAN & TRUST CO.,
By L. L. TURNER, *President.*

Attest: SAMUEL T. HOWE, *Secretary.*

That said guaranty was endorsed on said principal note. That said note became due and payable, as set forth in plaintiff's first cause of action, and that said The Western Investment Loan & Trust Company has wholly refused and neglected to pay the same, although payment has often been demanded of said defendant.

81 That there is now due said plaintiff from said The Western Investment Loan & Trust Company, on said guaranty, the sum of $2,500, with interest thereon at the rate of 12 per cent. per annum, from the 12th day of September, 1888, less the sum of $350,

paid as aforesaid on account of interest, which sum of money and interest plaintiff claims.

3. For his third cause of action against said defendants, said plaintiff says:

That on the twelfth day of September, A. D. 1888, the said S. S. Hite and Mary L. Hite, executed and delivered to J. E. Ethell their certain promissory note, in writing of that date, whereby for value received they promised to pay to the order of said J. E. Ethell, on the twelfth day of September, A. D. 1892, the principal sum of two thousand five hundred dollars, with interest thereon at the rate of seven per cent. per annum from date until paid, payable semi-annually, according to the tenor of eight interest coupons, bearing even date therewith, thereto annexed; executed and delivered by the said S. S. Hite and Mary L. Hite, at the same time with said principal note; said principal and interest notes to draw twelve per cent. interest from date after maturity, and payable at the office of the Western Investment Loan & Trust Company at Topeka, Kansas.

That said S. S. Hite and Mary L. Hite duly promised and agreed, in and by the terms of said promissory note, that if default should be made in the payment of any part of the interest thereon after the same should become due and payable, then that said note should, at the option of the legal holder thereof, become due and collectible without further notice.

That afterwards, and before the maturity of said note, the said J. E. Ethell, for a valuable consideration, endorsed, transferred and delivered the said note to this plaintiff, who thereby became, and ever since has been, and now is the legal owner and holder thereof. A true copy of said note, with all the indorsements thereon, together with all unpaid interest coupon notes, together with all the indorsements thereon, being interest coupon notes Nos. 5, 6, 7, 8 is hereto attached, marked Exhibit "B," and made a part of this petition.

That said S. S. Hite and Mary L. Hite wholly failed and neglected to pay said principal, note, or any interest thereon, when the same became due except interest coupon notes Nos. 1, 2, 3, and 4, but have made default thereon, which default has continued to this day. That by reason of said default, the said plaintiff has elected to declare and does now declare the said principal and interest notes due and payable.

That there is now due said plaintiff on said indebtedness notes and mortgage, the sum of two thousand five hundred dollars, with interest thereon at the rate of twelve per cent. per annum from the twelfth day of September, A. D. 1888, less the sum of three hundred and fifty dollars heretofore paid on account of interest, which sum of money and interest plaintiff claims.

4. For his fourth cause of action, plaintiff fully adopts and
82 makes a part hereof all the allegations and averments set forth in plaintiff's third cause of action, and says:

That at the time of the endorsement of said note to this plaintiff (reference being had to the note described and set forth in plaintiff's third cause of action) the said The Western Investment Loan &

Trust Company, for value, in writing, guaranteed the payment of the same in words and figures following, to wit:

TOPEKA, KANSAS, *May 9th*, 1889.

For a valuable consideration, the Western Investment Loan & Trust Company hereby guarantees payment of the within obligation, both principal and interest, at maturity.

THE WESTERN INVESTMENT LOAN & TRUST COMPANY,
By L. L. TURNER, *President.*

Attest: SAMUEL T. HOWE, *Secretary.*

That said guaranty was endorsed on said principal note. That said note became due and payable as set forth in plaintiff's third cause of action, and that said The Western Investment Loan & Trust Company has wholly refused and neglected to pay the same, although payment has often been demanded of said defendant.

That there is now due said plaintiff from said The Western Investment Loan & Trust Company, on said guaranty the sum of two thousand five hundred dollars, with interest thereon at the rate of twelve per cent. per annum from the twelfth day of September, A. D. 1888, less the sum of three hundred and fifty dollars, paid as aforesaid on account of interest, which sum of money and interest plaintiff claims.

5. For his fifth cause of action against said defendants, said plaintiff says:

That on the twelfth day of September, A. D. 1888, the said S. S. Hite and Mary L. Hite, executed and delivered to J. E. Ethell their certain promissory note, in writing of that date, whereby for value received they promised to pay to the order of said J. E. Ethell, on the twelfth day of September, A. D. 1892, the principal sum of two thousand five hundred dollars with interest thereon at the rate of seven per cent. per annum, from date until paid, payable semi-annually, according to the tenor of eight interest coupons bearing even date therewith thereto annexed; executed and delivered by the said S. S. Hite and Mary L. Hite at the same time with said principal note; said principal and interest notes to draw twelve per cent. interest from date after maturity, and payable at the office of the Western Investment Loan & Trust Company, at Topeka, Kansas.

That said S. S. Hite and Mary L. Hite duly promised and agreed in and by the terms of said promissory note, that if default should be made in the payment of any part of the interest thereon after the same should become due and payable, then that said note should, at the option of the legal holder thereof, become due and collectible without further notice.

83 That afterwards, and before the maturity of said note, the said J. E. Ethell, for a valuable consideration, endorsed, transferred, and delivered the said note to this plaintiff, who thereby became, and ever since has been, and now is the legal owner and holder thereof. A true copy of said note, with all endorsements thereon, together with all unpaid interest coupon notes, together

with all endorsements thereon, being interest coupons, notes Nos. 5, 6, 7, 8, is hereto attached, marked Exhibit "C" and made a part of this petition.

That said S. S. Hite and Mary L. Hite wholly failed and neglected to pay said principal note, or any interest thereon, when the same became due, except interest coupon- Nos. 1, 2, 3, and 4, but have made default thereon, which default has continued to this day. That by reason of said default the said plaintiff has elected to declare, and does now declare the said principal and interest notes due and payable.

That there is now due said plaintiff on said indebtedness, notes and mortgage, the sum of two thousand five hundred dollars, with interest thereon at the rate of twelve per cent. per annum from the twelfth day of September, A. D. 1888, less the sum of three hundred and fifty dollars heretofore paid on account of interest, which sum of money and interest plaintiff claims.

6. For his sixth cause of action, plaintiff fully adopts and makes a part hereof all the allegations and averments set forth in plaintiff's fifth cause of action, and says:

That at the time of the endorsement of said note to this plaintiff (reference being had to the note described and set forth in plaintiff's fifth cause of action), the said The Western Investment Loan & Trust Company, for value and in writing, guaranteed the payment of the same in words and figures following, to wit:

TOPEKA, KANSAS, *May 9th*, 1889.

For a valuable consideration the Western Investment Loan & Trust Company hereby guarantees payment of the within obligation, both principal and interest at maturity.

(Signed) THE WESTERN INVESTMENT LOAN & TRUST COMPANY,
By L. L. TURNER, *Pres.*

Attest: SAMUEL T. HOWE, *Sec'y.*

That said guaranty was endorsed on said principal note. That said note became due and payable as set forth in plaintiff's fifth cause of action, and that said The Western Investment Loan & Trust Company has wholly refused and neglected to pay the same, although payment has often been demanded of said defendant.

That there is now due said plaintiff from said The Western Investment Loan & Trust Company, on said guaranty, the sum of two thousand five hundred dollars, with interest thereon at the rate of twelve per cent. per annum from the 12th day of September, A. D. 1888, less the sum of three hundred and fifty dollars, paid as
84 aforesaid on account of interest, which sum of money and interest plaintiff claims.

That for the purpose of securing the payment of the notes set forth in plaintiff's first, third, and fifth causes of action, and the interest thereon, the said S. S. Hite and Mary L. Hite, as mortgagors did on the 12th day of September, 1889, execute and deliver to said defendant, C. F. Jilson, a- trustee, a certain trust deed of that date,

whereby they did grant, bargain, sell, convey and confirm unto said C. F. Jilson, as trustee, and to his successors in trust, the following-described tract, piece, and parcel of real estate, situate in the county of Smith and State of Kansas, described as follows, to wit:

Lots numbered nineteen (19) and twenty (20) in block twenty-eight (28), in the city of Smith Center.

That said property was conveyed and mortgaged to said C. F. Jilson solely for the purpose of securing the payment of the notes above set forth, and solely for the benefit of the holders of said notes, and that said C. F. Jilson has no beneficial right, title, or interest, in or to said property. Said trust deed contained with others the following conditions:

"That said mortgagor should pay all taxes and assessments levied upon said real estate, when the same should become due and payable; if the same were not so paid, the legal holder of said mortgage might, without notice, declare the whole sum of money secured by said trust deed due and payable at once, and might immediately cause said trust deed to be foreclosed. Further, that in default of the payment of any sum by said trust deed secured, when the same should become due, or in default of the specific performance of any covenant in said mortgage deed contained, then that the said legal holder or holders of the notes secured by said trust deed should be entitled to have and recover of and from the makers of said note by said trust deed secured interest at the rate of twelve per cent. per annum, computed annually on said principal note, from the date thereof to the time when the same should be paid in full. Further, that if the makers of said notes should fail to pay or cause to be paid any part of said money, either principal or interest, according to the tenor and effect of said notes or coupons when the same should become due, or to conform to or comply with any of the conditions or agreements in said mortgage deed contained, then that the said trustee, or his successors in trust, should have immediate possession of the premises hereinbefore described, and all the rents, issues, and emblements thereof, and the whole sum of money by said trust deed secured, should at the option of the legal holder or holders of the note secured by said trust deed, become due and payable at once without further notice. Further, that all appraisement of said real estate, and all benefit of the stay laws of the State of Kansas, were expressly waived. And further, that if the conditions of the said mortgage deed should be performed, then the said trust deed should be void; otherwise, it should be of full force and virtue.

That said trust deed was duly filed for record in the office of the register of deeds of Smith county, Kansas, on October 12th,
85 1888, at 10 o'clock a. m., and duly recorded in Book 5 of Mortgages, at page 581.

That by reason of the endorsement to plaintiff of said notes set forth in plaintiff's 1st, 3d, and 5th causes of action, the said plaintiff became and ever since has been, and now is, the owner and holder of all rights, and causes of action under said trust deed, a

true copy of which, with the endorsements thereon, is hereto attached, marked Exhibit "D."

That said S. S. Hite and Mary L. Hite have failed and neglected to pay the taxes levied and assessed against said mortgaged premises for the years 1888, 1889, 1890, and 1891, but have made default thereon, which default has continued to this day.

That by reason of the default made so, as aforesaid, in the payment of the notes set forth in plaintiff's first, third, and fifth causes of action, and in the payment of said taxes, and in the performance of the covenants of said trust deed, the conditions of said trust deed have been broken, and the same has become absolute.

That said defendant, C. F. Jilson, trustee in the trust deed herein set forth, has neglected, failed, and refused, and still neglects, fails, and refuses to bring any action for the foreclosure of said trust deed, or for the collection of the indebtedness secured thereby.

That said defendants C. F. Jilson, as trustee, the Western Investment Loan & Trust Company, John Mollison, Sarah Mollison, Mrs. E. E. Hickman, John N. Walker, Calista Walker, and Joseph Galbrath, M. C. Galbrath, have, or claim to have, some interest in, or lien upon said premises, or some part thereof, which interest or lien, if any such exists, has accrued subsequently, and is subject to the plaintiff's lien thereon under said mortgage; that the said premises are now wholly inadequate to pay the amount due on said note and trust deed; that said premises are being wasted, injured, and destroyed, and said plaintiff's security is being greatly impaired.

Wherefore, said plaintiff prays judgment against said defendants S. S. Hite, Mary L. Hite and The Western Investment Loan & Trust Company for the total sum of $7,500, with interest thereon at the rate of 12 per cent. per annum from the 1-th day of September, 1888, less the sum of $1,050 paid as aforesaid on account of interest, and for costs of suit; that said mortgage deed may be foreclosed, and that the lien, claim, interest, and equity of redemption of said defendants, S. S. Hite, Mary L. Hite, The Western Investment Loan & Trust Co., C. F. Jilson as trustee, Joseph Galbrath, M. C. Galbrath, John Mollison, Sarah Mollison, John N. Walker, and Calista Walker and E. E. Hickman, if any they have in and to said premises may be determined and settled, and that said plaintiff may be adjudged to have the first lien and claim on said premises, and that said mortgage- premises may be ordered to be sold, according to law, without appraisement: that the proceeds arising from said sale be applied to the payment of said indebtedness due said plaintiff; that said defendants and each and all of them may be forever barred and foreclosed of and from all right, title, interest, equity of redemption in and to said premises, or any part thereof; that the purchaser of said real estate at such sale be let into possession thereof.

86

Plaintiff further prays for the appointment of a receiver for such mortgaged premises during the pendency of this action, and that he may have such other and further relief as shall be agreeable to equity and good conscience.

GLEED & GLEED,
Attorneys for Plaintiff.

In the District Court, Smith County, State of Kansas.

H. L. WARD, Treasurer, Plaintiff,
vs.
S. S. HITE ET AL., Defendants. } Præcipe for Summons.

The clerk of said court will please issue summons in the above-entitled action on the petition therein filed for defendants, S. S. Hite, Mary L. Hite, Joseph Galbrath, M. C. Galbrath, John Mollison, Sarah Mollison, Mrs. E. E. Hickman, John N. Walker, and Calista Walker, directed to the sheriff of Smith county, Kansas, and for defendant C. F. Jilson, as trustee, and the Western Investment Loan & Trust Company, a corporation directed to the sheriff of Shawnee county, Kansas, and endorse thereon that plaintiff claims judgment for the sum of $7,500, with interest thereon at the rate of twelve per cent. per annum from the first day of September, 1888, less the sum of $1,050. And make the same returnable according to law.

GLEED & GLEED,
Attorneys for Plaintiff.

EXHIBIT "A."

$2,500.00. TOPEKA, KANSAS, *September* 12, 1888.

On the 12th day of September, 1892, for value received we promise to pay to the order of J. E. Ethell, the sum of two thousand five hundred dollars, with interest thereon at the rate of seven per cent. per annum from date until paid, payable semi-annually according to the tenor of eight interest coupons, bearing even date herewith, hereto annexed; both principal and interest payable at the office of the Western Investment Loan & Trust Company, in Topeka, Kansas; and if default be made in the payment of any part of said interest after the same becomes due and payable, then this note shall, at the option of the legal holder hereof, become due and collectible without further notice. This note and the coupons are to draw twelve per cent. interest per annum after maturity, and are secured by a mortgage of even date herewith on real estate.

S. S. HITE.
MARY L. HITE.

No. 75.

87 (Attached to the above note were four interest coupons made payable respectively on September 12, and March 12, 1892, and September 12, and March 12, 1891, and numbered respectively, 8, 7, 6, 5. Apart from the date they are identical with coupon No. 8.

$87.50. TOPEKA, KANSAS, *Sept.* 12, 1888.

On the 12th day of September, 1892, for value received, we promise to pay to the order of J. E. Ethell, at the office of the Western Investment Loan & Trust Company, in Topeka, Kansas, eighty-seven $\frac{50}{100}$ dollars, for interest due on that day according to the tenor of a principal note of $2,500. This note to draw interest

at twelve per cent. after maturity until paid, and is secured by a mortgage of even date on real estate.

S. S. HITE.
MARY L. HITE.

No. 8.

Endorsed: "Without recourse." J. E. Ethell.

Said note was endorsed:

Coupon mortgage note. S. S. & Mary L. Hite to J. E. Ethell, $2,500. Date, September 12th, 1888. Due, September 12th, 1892. "Without recourse" pay to the order of H. L. Ward, treasurer. J. E. Ethell.

TOPEKA, KANSAS, *May* 9, *A. D.* 1889.

For a valuable consideration, the Western Investment Loan & Trust Company hereby guarantees payment of the within obligation, both principal and interest at maturity.

THE WESTERN INVESTMENT
LOAN & TRUST COMPANY,
By L. L. TURNER, *President.*

Attest: SAM'L T. HOWE, *Secretary.*

Negotiated by the Western Investment Loan & Trust Company, Topeka, Kansas.

(Exhibits B and C consist of two notes with four coupons attached identical with Exhibit A, and endorsed in precisely the same manner.)

88 EXHIBIT "D."

Trust Deed.

This indenture, made this 12th day of September, A. D. 1888, between S. S. Hite and Mary L. Hite, of the county of Smith, and State of Kansas, parties of the first part, and C. F. Jilson, of the county of Shawnee, and State of Kansas, trustee, party of the second part (and in case of the death, absence, or removal from said county of Shawnee, or the refusal or inability to act, of the said party of the second part, then the judge of the district court of Shawnee county shall have power to appoint—either in term time or vacation, and without notice—upon the application of any party in interest, a successor in trust to said party of the second part under this deed, for the purpose hereinafter expressed, with the same power and authority as said trustee; a copy of the order making any such appointment may be filed with the register of deeds of said Shawnee county) and the Western Investment Loan & Trust Company, of Topeka, in the State of Kansas, party of the third part:

Witnesseth: that the parties of the first part, in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, and the further consideration of a contract of guaranty made by the party of the third part to and with the said parties of the first part,

as hereinafter mentioned, do by these presents, grant, bargain, convey, and mortgage unto said party of the second part, and to his successors in trust, the real estate situated in the county of Smith, and State of Kansas, described as follows:

Lots numbered nineteen and twenty (19 and 20) in block numbered twenty-eight (28) in the city of Smith Center, according to the replat of said block, as shown by the records of said city and county.

To have and to hold the same, together with all and singular the the emblements, tenements, hereditaments and appurtenances thereunto belonging *to* or in anywise appertaining; and the parties of the first part hereby covenant that at the execution and delivery hereof they are lawfully seized of an estate in fee in the same premises; that they have good right to mortgage the same; that the said premises are free and clear of all liens and incumbrances whatsoever, and that the said parties of the first part will forever warrant and defend the title of the said premises against all claims and demands, whatsoever:

Provided always that whereas, the parties of the first part are justly indebted to J. E. Ethell in the sum of seven thousand five hundred dollars according to the terms of three promissory notes of even date herewith, duly executed by the said parties of the first part, each calling for twenty-five hundred dollars ($2,500.00), payable on the 12th day of September, 1892, after date thereof, to the order of the said J. E. Ethell, in the aforesaid sum of money, for value received, with interest thereon at the rate of 7 per cent. per annum, from the date of said promissory notes until the said
89 principal sum is fully paid, interest being payable semi-annually, on the 12th days of March and September in each year, according to and upon presentation of coupons or interest notes therefor, thereunto attached—both principal and interest payable in lawful money, with New York exchange, at the office of the Western Investment Loan & Trust Company, in Topeka, Kansas; and

Whereas, the said parties of the third part, in pursuance of the contract of guaranty, hereinbefore referred to as a part of the consideration to this instrument, has, by writing duly endorsed thereon, guaranteed the payment of the before-described promissory notes; in words and figures as follows:

TOPEKA, KANSAS, —— —, A. D. 18—.

For a valuable consideration, the Western Investment Loan & Trust Company hereby guarantees payment of the within obligation, both principal and interest, on or before — days after maturity; it is, however, understood by the parties to this contract, that the said guarantor shall have the right to take up or redeem this obligation at any time before maturity, by paying the legal holder the principal sum herein mentioned, with interest at the rate herein specified, computed to a day three months after the date of such redemption. THE WESTERN INVESTMENT LOAN & TRUST COMPANY,

[SEAL.] By —— ——, *President.*

Attest: —— ——, *Secretary.*

And whereas, the said parties of the first part hereby covenant and agree to pay all taxes assessed against said premises and to keep the buildings that may be thereon insured in some responsible company, for at least seventy-five hundred dollars, loss, if any, payable to the party of the second part as his interest may appear, and in case the taxes are not paid when the same become due and payable, and the buildings are not kept insured, as aforesaid, by the owner of the premises or his assigns, then the party of the third part may elect to pay the taxes and insurance premiums, and the amount so paid shall be secured hereby, and bear twelve per cent. interest per annum from the time of such payments.

Now, if the said parties of the first part shall pay or cause to be paid to said J. E. Ethell, or his assigns, the said sum of money in said promissory notes mentioned, according to the tenor of said notes and annexed coupons; and shall repay or cause to be repaid to said party of the third part the taxes assessed and levied on said premises, and paid by the said party of the third part, together with the insurance premiums paid by the said party of the third part, with the interest accrued thereon as herein agreed; and shall repay or cause to be repaid to said party of the third part all sums of money paid by the said party under and by virtue of the
90 contract of guaranty hereinbefore recited, then these presents shall be wholly discharged, at the cost of the said parties of the first part; otherwise to be and remain in full force.

But if said sum of money, or any part thereof, or any interest thereon, is not paid when the same is due and payable, or if the taxes assessed and levied against said premises, or any party thereof, are not paid when the same are due and payable, or if any of the buildings on said premises are not insured as aforesaid, then the whole amount of said promissory notes shall immediately become due and payable, at the option of the said party of the third part, and said party of the second part, upon the request of the party of the third part, may proceed at once to foreclose this mortgage by suit in a court of competent jurisdiction and obtain a decree for the sale and conveyance of said premises, the emblements thereon and the fixtures thereto attached, and in case suit is brought thereon, the rate of interest stated in said principal notes and coupons shall be waived, and said notes shall bear interest at the rate of twelve per cent. per annum, computed annually, from the date thereof to the time when the money shall be actually paid; but any payments made on account of interest shall be credited in said computation so that the total amount of interest collected shall be, and shall not exceed, the lawful rate of twelve per cent. And said party of the second part, or his successors in trust, shall become and be at once entitled to full possession of said premises, and all the emblements thereon and fixtures thereto attached, and to receive all rents, issues and profits thereof, and have power to control the same, especially to prevent all waste of whatever nature, by any person whomsoever, upon any part of said premises during said foreclosure proceedings.

Said premises shall be sold under said decree, and out of the pro-

ceeds of said sale shall be paid,—first, the costs of said foreclosure proceedings; second, all sums due said party of the third part for moneys advanced under any of the provisions of this mortgage, with twelve per cent. interest thereon; third, said indebtedness, with interest as provided in this instrument, and costs; and any surplus shall be paid to the parties of the first part or their legal representatives.

All appraisement and stay laws are hereby expressly waived.

In testimony whereof, the said parties of the first part have hereunto set their hands, the day and year first above written.

S. S. HITE.
MARY L. HITE.

Acknowledgment.

STATE OF KANSAS, }
County of Smith. }

Be it remembered, that on this 12th day of October A. D. 1888, before me, the undersigned, a notary public in and for the county and State aforesaid, came S. S. Hite and Mary L. Hite, husband and wife, who are personally known to me to be the same persons
91 who executed the within instrument of writing, and such persons have duly acknowledged the execution of the same.

In testimony whereof, I have hereunto set my hand and affixed my official seal the day and year last above written.

G. W. WHITE,
Notary Public.

[SEAL.] My commission expires May 2, 1891.

Endorsed: Trust deed, from S. S. Hite and Mary L. Hite, to C. F. Jilson, trustee. The Western Investment Loan & Trust Co., of Topeka, Kansas. *Cestui que trust.*

STATE OF KANSAS, }
Smith County, } *ss:*

This instrument was filed for record on the 12th day of Oct. A. D. 1888, at 10 o'clock a. m., and duly recorded in Book, 5, page 581.

L. P. SIMPSON,
Register of Deeds.

[SEAL.] Fees $2.00.

Said petition is endorsed:

"No. 2184. In the district court of Smith county, Kansas. H. L. Ward, treas. plaintiff *vs.* S. S. Hite, *et al.*, defendant-. Petition & precipe. Filed this 23d day of December, 1892, J. D. Mollison, clerk." (Gleed & Gleed, attorneys for plaintiff.)

Summons.

STATE OF KANSAS, } ss:
Smith County, }

The State of Kansas to the sheriff of Smith Co., Greeting:

You are hereby commanded, to notify S. S. Hite, Mary L. Hite, Joseph Galbrath, M. C. Galbrath, John Mollison, Sarah Mollison, Mrs. E. E. Hickman, John N. Walker and Calista Walker, that they have been sued in the district court within and for the county of Smith, in the fifteenth judicial district of the State of Kansas, and must answer the petition filed by plaintiff, H. L. Ward, on or before the 20th day of January, 1893, or said petition will be taken as true, and judgment rendered accordingly. And return this writ on or before the 31st day of December, 1892.

92 In witness whereof, I have hereunto signed my name and affixed the seal of said court, at my office in Smith Centre, Kansas, in said county, this 23d day of Dec., A. D. 1892.

[SEAL.] J. D. MOLLISON,
Clerk of the District Court.

(*Sheriff's Return.*)

Received this writ this 23d day of December, 1892, at 10 o'clock a. m. December 23, 1892, served the same by delivered a copy thereof, with the endorsements thereon, duly certified, to the within-named defendant- S. S. Hite, Joseph Galbrath, M. C. Galbrath, John Mollison, Sarah Mollison, Mrs. E. E. Hickman, John N. Walker and Calista Walker, personally.

P. H. McELHONE, *Sheriff,*
By W. POST, *Dep'y.*

Mary L. Hite dead. Not summoned.

P. H. McELHONE, *Sheriff,*
By W. POST.

(Endorsed.)

"No. 2184, summons. H. L. Ward, plaintiff, *vs.* S. Hite, *et al.,* defendant-.

"If the defendant- fail to answer, the plaintiff will take judgment for $7,500 *dollars,* with interest thereon at the rate of 12 per cent. per annum from the 1st day of Sept., 1888, less the sum of $1,050, and costs of suit.

J. D. MOLLISON, *Clerk.*"

Issued Dec. 23, 1892. Returnable Dec. 31, 1892. Filed Dec. 23, 1892.

J. D. MOLLISON, *Clerk.*

Sheriff's Fees.

Serving summons, first person	$ .50
7 additional persons	1.75
8 copies summons	2.00
Total	$4.25

P. H. McELHONE, *Sheriff*,
By W. POST, *Dep'y*.

93 *Summons.*

STATE OF KANSAS, } ss:
Smith County, }

The State of Kansas to the sheriff of Shawnee Co., Greeting:

You are hereby commanded to notify C. F. Jilson, as trustee, and the Western Investment Loan & Trust Company, a corporation, that they have been sued in the district court within and for the county of Smith, in the fifteenth judicial district of the State of Kansas, and must answer the petition filed by plaintiff, H. L. Ward, on or before the 23d day of January, 1893, or said petition will be taken as true and judgment rendered accordingly. And return this writ on or before the 3d day of January, 1893.

In witness whereof, I have hereunto signed my name and affixed the seal of said court, at my office in Smith Centre, Kansas, in said county, this 23d day of Dec., A. D. 1892.

[SEAL.]

J. D. MOLLISON,
Clerk of the District Court.

(*Sheriff's Return.*)

"Received this writ this 23d day of Dec., 1892, at 3 o'clock p. m. Dec. 28, 1892, served the same by delivering a copy thereof, with the endorsements thereon, duly certified to the within-named defendants, C. F. Jilson, as trustee, and Western Investment Loan & Trust Company, a corporation, by delivering a true and certified copy thereof to James Troutman, president of said company, personally.

J. M. WILKERSON, *Sheriff*,
By A. KUYKUNDALL, *Dep'y*."

"No. 2184. Summons. H. L. Ward, plaintiff, *vs.* S. S. Hite, *et al.*, defendant-.

"If the defendant- fail to answer, the plaintiff will take judgment for $7,500 *dollars*, with interest thereon at the rate of 12 per cent. per annum from the 12th day of Sept., 1888, less the sum of $1,050.

J. D. MOLLISON, *Clerk*."

Issued Dec. 23, 1892. Returnable Jan. 3, 1893. Filed Dec. 30, 1892.

J. D. MOLLISON, *Clerk*.

Sheriff's Fees.

Serving summons, first person	$ .50
Two additional persons	.50
Two copies summons	.50
Mileage, 2 miles	.20
Total	$1.70

J. M. WILKERSON, *Sheriff.*
A. KUYKUNDALL, *Dep'y.*

94 "In the District Court of Smith County, Kansas."

H. L. WARD, Plaintiff,
vs.
S. S. HITE, MARY L. HITE, ET AL., Defendants. } Motion.

Comes now the defendant, S. S. Hite, and moves the court to require the plaintiff to make his petition more specific, definite, and certain in the following particulars, viz:

1. To state whether plaintiff sues for and on his own behalf or for the benefit of another person, company, corporation, or partnership.
2. To state what particular company, corporation, partnership, or person (if any other than himself), this suit is brought for.
3. To state what particular company, corporation, or partnership, if any, he is treasurer of.
4. To state the names of the real owners of the notes and mortgages at the time of commencing this suit.

R. M. PICKLER,
Att'y for Def't S. S. Hite.

(Endorsed:) "Filed Jan. 18, 1893. J. D. Mollison, clerk of the district court."

(By agreement of the parties hereto, there is omitted from this judgment record, a motion for a receiver of lots 19 and 20 in block 28 in the town of Smith Centre; notice of that motion and service thereof; the order of the court appointing such a receiver; the oath of the receiver; the bond of such receiver approved by the court; and the inventory taken by said receiver of said property.)

At a session of the district court of the State of Kansas, in and for Smith county, held at Smith Center, Kansas, on the 27th day of March, A. D. 1893, the Honorable Cyrus Heren being present and presiding in said court, the following among other proceedings were had and done, to wit:

H. L. WARD, Treasurer, Plaintiff,
vs.
S. S. HITE, MARY L. LITTLE, C. F. JILSON, as Trustee; The Western Investment Loan & Trust Company, a Corporation; Joseph Galbrath, M. C. Galbrath, John Mollison, Sarah Mollison, Mrs. E. E. Hickman, John N. Walker, Calista Walker, Defendants.
Journal Entry of Judgment.

95 Be it remembered, that on th*is* said 27th day of March, A. D. 1893, the same being a regular day of the March, 1893, term of said court, comes the said plaintiff by his attorneys, Gleed & Gleed, and come also the said defendant, S. S. Hite, by his attorney, and withdraws his motion filed in said cause, and consents to judgment, and every and all of the other of said defendants to said cause and above named came not, and plaintiff shows to the court, and the court finds that service of summons has been duly and regularly made upon said defendants, and each and all of them, except defendant Mary L. Hite, personally, and on motion of plaintiff this cause is hereby dismissed as to defendant Mary L. Hite, and as to her only.

And the court further finds that said defendants, and each and all of them, except defendant S. S. Hite, have failed and still fail to appear and plead in anywise to plaintiff's petition herein, though the time for so doing had fully expired before the trial hereof; and thereupon this cause came regularly on for trial upon the pleadings herein and the evidence, and the said parties in open court, and with the consent of the court waive a jury herein, and submit this cause to the court, and the court, after hearing the evidence, finds that all the allegations and averments contained in the petition of the said plaintiff, filed herein are true, and that there is due from said defendants S. S. Hite and The Western Investment Loan & Trust Company to the said plaintiff on the notes and mortgage sued on in this action, the sum of $9,787.50, and that said notes specify that said indebtedness shall bear interest at the rate of 12 per cent. per annum, and that said mortgage has the words "appraisement waived," therein inserted.

The court further finds that said plaintiff has a first and prior lien on the lands and tenements in said petition described, by virtue of the mortgage in said petition set out; to secure the payment of said indebtedness.

It is, therefore, considered, ordered, and adjudged by the court, that the said plaintiff do have and recover of and from the said defendant, The Western Investment Loan & Trust Company, the said sum of $9,787.50, the amount so as aforesaid found due to said plaintiff, and the costs herein, taxed at $—, and that said judgment for $9,787.70 bear interest at the rate of 12 per cent. per annum.

It is further ordered and adjudged by the court, that in case the said defendant fail, for six months from the date of the rendition of this judgment, to pay off and discharge the amount herein adjudged to be due the plaintiff, in said cause, with interest and costs, an order

of sale issue to the sheriff of said county of Smith, in the State of Kansas, commanding him to advertise and sell, according to law, without appraisement, the lands and tenements in said petition described, to wit:

Lots numbered nineteen (19) and twenty (20) in block No. twenty-eight (28) in the city of Smith Center, lying and situate in the county of Smith, in the State of Kansas, and apply the proceeds arising from said sale:

First. In payment of the costs of said sale, and of this action;

96 Second. In payment to the said plaintiff of said sum of $9,787.50, the amount so as aforesaid found due to said plaintiff, together with the interest thereon;

Third. That the residue, if any there be, he pay into this court, to abide the further order thereof.

And it is further ordered and adjudged by the court, that from and after the sale of said lands and tenements, under and by virtue of this judgment and decree, that each and all of the defendants herein named, and all persons claiming under them, or either of them, since the commencement of this action be, and they and each of them are hereby, forever barred and foreclosed of and from all liens upon, right, title, interest, property, estate or equity of redemption, of, in or to said lands and tenements, or any part thereof.

Approved.

CYRUS HEREN, *Judge.*

(By agreement of the parties hereto, there is omitted from this judgment record the order to the sheriff for the sale of said lots Nos. 19 and 20; the affidavit of publication thereof; the plaintiff's motion to confirm said sale; and the decree of the court in confirmation thereof; also the court's order accepting the report of said receiver.)

Execution.

UNITED STATES OF AMERICA:

STATE OF KANSAS, } ss:
Smith County, }

The State of Kansas to J. Jarvis, sheriff of Smith county, Kansas, Greeting:

Whereas, in an action then pending in the district court of Smith county, Kansas, wherein H. L. Ward, treasurer, was plaintiff, and S. S. Hite, Mary L. Hite, C. F. Jilson, as trustee; The Western Investment Loan & Trust Company, a corporation; Joseph Galbrath, M. C. Galbrath, John Mollison, Sarah Mollison, Mrs. E. E. Hickman, John N. Walker, Calista Walker were defendants, said plaintiff H. L. Ward, treasurer in and by consideration of the said court duly recovered a judgment against the defendant, The Western Investment Loan & Trust Company, a corporation, for the sum of $9,787.50 nine thousand seven hundred eighty-seven and $\frac{50}{100}$ dollars debt, and the accrued costs of said action taxed at $5.50, and that said judg-

ment for $9,787.50 bear interest from the date of the rendition thereof, to wit, March the 27th, 1893, at the rate of 12 per cent. per annum, and whereas said judgment, less the sum of $4,924.75 four thousand nine hundred twenty-four and $\frac{75}{100}$ dollars, which was paid thereon on the 11th day of December, 1893, is and remains unpaid and unsatisfied. Now therefore, you are hereby commanded that of the goods and chattels of said judgment debtor, the Western Investment Loan &
97 Trust Company, a corporation you cause to be made, the money specified herein, to wit, $9,787.50, nine thousand seven hundred eighty-seven and $\frac{50}{100}$ dollars, less the sum so aforesaid paid thereon with interest as aforesaid and the costs accruing upon this writ and for want of goods and chattels you cause the same to be made of the lands and tenements of said judgment debtor, The Western Investment Loan & Trust Company, a corporation, and you are further hereby commanded to make due return of this writ with your proceedings thereunder indorsed thereon before said district court within sixty days from the date hereof and then and there have the money made by you upon this writ, to render unto the person entitled thereto and have you then and there this writ.

Witness my hand and seal of said district court by me affixed in the city of Smith Center in the county of Smith and State of Kansas this the 14th day of September, 1896.

[Seal of the District Court of Smith County, Kansas.]

L. L. JONES,
Clerk of the District Court of Smith County, Kansas.

STATE OF KANSAS, }
Smith County, } *ss:*

SHERIFF'S OFFICE, SMITH CENTER, KANSAS.

I, the undersigned sheriff of Smith county, Kansas, received the within writ on the 15th day of September, A. D. 1896, at the hour of 10 o'clock a. m., and after diligent search and inquiry duly made by me for goods, chattels, lands, tenements, and property of the within-named judgment debtor, The Western Investment Loan & Trust Company, a corporation whereon to levy said writ I have been and am unable to find and cannot find any goods, chattels, lands, tenements or property whatever of said judgment debtor The Western Investment Loan & Trust Company, a corporation whereon to levy said writ and I therefore return the same on this the 16th day from date thereof, wholly unsatisfied, dated at Smith Center, Kansas, this the 4th day of November, 1896.

J. JARVIS,
Sheriff of Smith County, Kansas.

(Execution.)

UNITED STATES OF AMERICA:

STATE OF KANSAS, } ss:
Smith County, }

The State of Kansas to the sheriff of Shawnee county, Kansas, Greeting:

Whereas, in an action then pending in the district court of Smith county, Kansas, wherein H. L. Ward, treasurer, was plaintiff, and S. S. Hite, Mary L. Hite, C. F. Jilson as trustee, The Western Investment Loan & Trust Company, a corporation, Joseph Galbrath, M. C. Galbrath, John Mollison, Sarah Mollison, Mrs. E. E. Hickman, John N. Walker, Calista Walker, were defendants, said
98 & 99 plaintiff H. L. Ward, treasurer, in and by consideration of said court duly recovered a judgment against the defendant, The Western Investment Loan & Trust Company, a corporation for the sum of nine thousand seven hundred eighty-seven and $\frac{50}{100}$ dollars ($9,787.50) debt and the accrued costs of said action taxed at $4.00, and that said judgment for $9,787.50 bear interest from the rendition thereof, to wit, March 27, 1893, at the rate of 12 per cent. per annum, and whereas said judgment less the sum of $4,924.75, which was paid thereon on the 11th day of December, 1893, is and remains unpaid and unsatisfied.

Now, therefore, you are hereby commanded that of the goods and chattels of said judgment debtor The Western Investment Loan & Trust Company, a corporation, you cause to be made, the money specified herein, to wit, $9,787.50 less the sums as aforesaid paid thereon, with interest thereon as aforesaid, and the costs accruing upon this writ and for want of goods and chattels you cause the same to be made of the lands and tenements of said judgment debtor, The Western Investment Loan & Trust Company corporation, and you are further hereby commanded to make due return of this writ with your proceedings thereunder duly indorsed thereon before said district court within sixty days from the date hereof, and then and there have the money made by you upon this writ to render unto the person entitled thereto, and have you then and there this writ.

Witness my hand and the seal of the said district court by me affixed at my office in Smith Center in the county of Smith and State of Kansas this 14th day of September, A. D. 1896.

[Seal of the District Court of Smith County, Kansas.]

L. L. JONES,
Clerk of the District Court of Smith County, Kansas.

100 The following endorsement is on the writ of execution issued to the sheriff of Shawnee county:

STATE OF KANSAS, } ss:
County of Shawnee, }

SHERIFF'S OFFICE, TOPEKA, KANSAS.

I, the undersigned sheriff of Shawnee county, Kansas, received the within writ on the 16th day of September, 1896, at the hour of 10 o'clock a. m., and after diligent search and inquiry, duly made by me for goods, chattels, lands, tenements, and property of the within-named judgment debtor, The Western Investment Loan & Trust Company, a corporation whereon to levy said writ, I have been and am unable to find and cannot find any goods, chattels, lands, tenements or property whatever of said judgment debtor The Western Investment Loan & Trust Company, a corporation whereon to levy said writ, and I therefore return the same on October the 31st, 1896, thereof wholly unsatisfied. Dated at Topeka, Kansas, this 31st day of October, 1896.

R. F. KEPLEY,
Sheriff of Shawnee County, Kansas,
By W. LUCAS, *Undersheriff.*

Fees, return $1.50.

District Court of Smith County, Kansas.

H. L. WARD, Treasurer, Plaintiff,
v.
S. S. HITE ET AL., Defendants. } No. 2184.

Execution.

Amount of judgment.—Principal, $9,787.50. Interest at 12 per cent. from March 27, 1893.

Amount paid $4,924.75, Dec. 11, 1893. Clerk's costs, $5.50. Sheriff's costs, $1.50.

Recorded in foreign execution docket, page 268.

E. M. COCKRELL, *Clerk.*

Filed Nov. 11, 1896.

L. L. JONES, *Clerk.*

STATE OF KANSAS, } ss:
County of Smith, }

I, the undersigned, S. L. Amis, clerk of the district court of Smith county, Kansas, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings had in said court in the therein-entitled action wherein H. L. Ward, treasurer, was and is plaintiff, and S. S. Hite, Mary L. Hite, C. F. Jilson, as trustee, The Western Investment Loan & Trust Company, a corporation, Joseph Galbrath, M. C. Galbrath, John Mollison, Sarah Mollison, Mrs. E. E. Hickman, John N. Walker, and Calista Walker, were and are defendants, as the same appear of record and on file in my office and custody.

Witness my hand and the seal of said district court by me affixed

at my office in Smith Center, Smith county, Kansas, this 12th day of June, 1899.

[SEAL.]

S. L. AMIS,
Clerk of the District Court of Smith County, Kansas.

101 & 102 STATE OF KANSAS, } ss:
County of Smith, }

I, the undersigned, R. M. Pickler, sole and presiding judge of the district court of Smith county, Kansas, do hereby certify that the above and foregoing attestation of S. L. Amis, clerk of said district court, to the above and foregoing transcript is in due form.

Witness my hand at Smith Center, Kansas, this 13th day of June, 1899.

R. M. PICKLER,
Judge of the District Court of Smith County, Kansas.

103–106 *Index.*

	Page.
Declaration	3
Defendant's plea, and brief statement	10
Amendment to defendant's brief statement	10
Second amendment to defendant's brief statement	11
Evidence:	
Charter of Western I. L. & T. Co	12
Deposition of J. A. Troutman	13
Plaintiff's Exhibit A. By-laws of Western I. L. & T. Co	24
Minutes of meetings	27
Plaintiff's Exhibit B. Extract from stockholders' book	34
Plaintiff's Exhibit E. Trial balance	34
Defendant's Exhibit I. Certificate of stock, No. 125	35
Plaintiff's Exhibit F. Certificate of stock, No. 37	36
Plaintiff's Exhibit G. Stub of certificate 125	36
Plaintiff's Exhibit H. Stub of certificate 37	36
Deposition of Edward Joslin	37
Deposition of F. E. Kingsbury	47
Letters Troutman to Joslin	51
Record of judgment	53

107 United States Circuit Court of Appeals for the First Circuit, October Term, 1900.

H. L. WARD, Treasurer, Plaintiff, Plaintiff in Error,
v.
EDWARD JOSLIN, Defendant, Defendant in Error. } No. 340.

Error to the circuit court for the district of New Hampshire.

Before Colt, Putnam, and Brown, JJ.

Opinion of the Court.

December 6, 1900.

PUTNAM, *J.*:

This suit was brought by a creditor of a Kansas corporation, known as the Western Investment Loan and Trust Company, organized on February 25, 1888, against a stockholder in that corporation, for a claim against it which had gone into judgment and remains unsatisfied. The case was tried in the circuit court by the presiding judge, a jury having been duly waived according to the statute. Among other findings of the court appears the following:

"I find as matter of fact, upon the evidence contained in the record and upon the arguments, that Ward's claim against the trust company was upon a guaranty, given upon a valuable consideration, of the payment of certain promissory notes from one third party to another, and was not a guaranty of the payment of securities negotiated by the company."

108 The judgment below was for the defendant. Thereupon the plaintiff took out this writ of error. Therefore, we will describe the parties merely as plaintiff and defendant.

The underlying provision with reference to the liability of stockholders in Kansas corporations is found in the constitution, article 12, section 2, as follows:

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes."

The finding of the court below which we have cited, uses "guaranty" in the singular, but there were several guaranties, all of the same tenor, given at the same time, and bearing date of May 9, 1889. At that time the General Statutes of Kansas, 1889, had not come into force, and we look for the law to the Compiled Laws of Kansas, 1885. Chapter 23, § 5, enacts for what purposes corporations may be formed, with the rest the following:

"Thirty-eighth. The organization of loan and trust companies: provided, that nothing in this act shall be construed to authorize such loan and trust companies to sell real estate held as security, except in the manner provided by law.

Thirty-ninth. The accumulation and loan of funds, the erection of buildings, and the purchase and sale of real estate for the benefit of its members."

Section 11, among other powers of corporations, grants the following:

"Sixth. To make by-laws, not inconsistent with existing laws, for the management of its property, the regulation of its affairs, and for the transfer of its stock. Seventh. To enter into any obligation or contract essential to the transaction of its ordinary affairs."

The statute speaks of the "charter," which after all is merely the articles of association, as the statutes provide for incorporation by such articles, and for no other method. The corporation in
109 this case was thus organized. The articles enumerate the purposes for which the corporation was formed, and with the rest, "to transact the business of a loan and trust company." The by-laws create a loan committee with certain powers, but the power of guarantying is not expressed. The court below found that the directors had authorized the president and secretary to guaranty the payment of securities negotiated by the company, but there seems to have been no by-law on the topic. There is nothing in the statutes of Kansas, nor in the decisions of its courts, defining the powers of a "loan and trust" company; neither has there been cited any other statute or decision defining the powers of corporations of that character.

Banking corporations are authorized by the laws of Kansas. They are empowered to buy and sell exchange, and to discount negotiable paper. Nowhere is any express permission given them to rediscount their own notes, or to sell them, or to give any guaranty, and, in these respects, banking corporations and "loan and trust" companies stand on the same footing. There is nothing in the statutes expressly vesting either power in either.

In this condition of legislation, The Commercial Bank *v.* The Cheshire Provident Institution, 59 Kan. 361, decided in 1898 with reference to a banking corporation, said, at page 364:

"The record before us does not contain any of the evidence offered at the trial. The general finding resolves all doubt as to the facts against the plaintiff in error. We must, therefore, presume that the guaranty was executed for a valuable consideration, by the duly authorized officers of the bank, and in due course of business. The claim that a banking institution dealing in commercial paper is without authority to bind itself by a guaranty thereof, has nothing to commend it to especial favor. It is true that, in this case, the paper itself does not indicate that the Commercial bank ever owned it. Nevertheless, it may have received the proceeds, and the guaranty may have been made strictly in the interest of the bank."

The judgment of the court below, holding the bank liable on its guaranty of a certain promissory note, was affirmed; but it is necessary to distinguish this case from that at bar in one par-
110 ticular. It appears, at page 362, that the parties went to trial on the facts without regard to the pleadings, and the

general finding, referred to at page 364, imported into the record enough to sustain the judgment on appeal.

The result is that it cannot be determined that there is anything in the laws of Kansas, with reference to "loan and trust" companies, which infringes the general rule that a corporation cannot guaranty a liability unless it is created in the ordinary course of its business, and nothing to show that a guaranty by a "loan and trust" company of any paper is thus created unless, to use the language of The Commercial Bank *v.* The Cheshire Provident Institution, it received the proceeds of the paper which it guaranteed. This is within the common rule that banking institutions may guaranty paper owned by them when they negotiate it, as several times stated by the Supreme Court.

In the absence of any statutes or judicial decisions in reference thereto, there seems to be no escape from the proposition that what were the powers of this corporation with reference to the guaranties on which the judgment against it was rendered, was, within the limitations of this case, a question of local usage, and, therefore, of fact, to be determined by the court below. Within this observation falls the question whether or not there were any by-laws which extended the powers of the corporation to the execution of these guaranties. The court below does not follow the express language of its opinion that the guaranties were *ultra vires*, when it comes to state its findings, but it must be taken to have made an equivalent finding, because it said that they were not "within the reasonable and proper scope of the business as contemplated by the parties."

Only disjointed provisions are found in the Compiled Laws of Kansas, 1885, fixing the liability of stockholders. Chapter 23 provides, in section 44, that, on dissolution, suits may be brought against stockholders for "debts unpaid;" and section 46 reads as follows: "No stockholder shall be liable to pay debts of a
111 corporation, beyond the amount due on his stock, and an additional amount equal to the stock owned by him." Section 32 enacts generally that, when an execution has been issued against a corporation, and property cannot be found on which to levy it, execution may go against any of the stockholders, "or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

The plaintiff claims that, by virtue of the last provision, his right against a stockholder was perfect whenever he had an execution against the corporation, no matter from what the judgment against it arose; and in support thereof, he cites Grund *v.* Tucker, 5 Kan. 70. That suit was based on an act of 1863; and some expressions in the opinion would seem to sustain the plaintiff's proposition. Nevertheless, the opinion as a whole does not support him, but it relies on the provision of the act of 1863, to the effect that stockholders are liable for "all debts and responsibilities of the corporation." The court observes that a judgment creates a responsibility, which cannot be contravened. This peculiar expression disappeared from subsequent revisions. In view of the rule that statutes are to be construed *in pari materia*, section 32 must be restricted to cases

where the stockholder's liability is elsewhere established, by either the constitution or the statutes, and these are limited to "debts unpaid" and "dues;" and it cannot justly be claimed that "debts unpaid" is a broader expression than "dues."

It is maintained by the defendant that even the word "dues," as used in the constitution, has a narrow construction. This is erroneous. In Whitman *v.* Oxford National Bank, 176 U. S. 559, 562, the opinion states that it includes all contractual obligations. We refer, also, to Bouvier's Law Dictionary, "due," showing that the word may signify "what ought to be paid, what may be demanded;" and to Judge Story's observation in Carver *v.* Braintree Company, 2 Story, 432, 449, on the words "debts" and "dues," that "dues" is broader than "debts."

112 The only decisions of the courts in Kansas which we have found, bearing in any way on this case, are the following:

In The Atchison Railroad Company *v.* Fletcher, 35 Kan. 236, decided in 1886, the court held that, if the Atchison Company had authority under any circumstances to guaranty bonds, the guaranty of the particuliar bonds then in issue would be binding in the hands of parties purchasing them in good faith and without notice; but, on the pleadings in the original suit in the case at bar, the present plaintiff had notice, because the guaranties of the corporation were a part of the transaction of his obtaining the notes. In Town Company *v.* Morris, 43 Kan. 282, 284, decided in 1890, the court laid down the following broad rule:

"While an executory contract made by a corporation without authority cannot be enforced, yet where the contract has been executed and the corporation has received the benefit of it, the law interposes an estoppel, and will not permit the validity of the contract to be questioned."

This was a suit, not for the value of the stock of merchandise in question, but for its agreed purchase-money. This was allowed to be recovered, notwithstanding the defence of *ultra vires*. The case was referred to in The Alexandria Railroad Company *v.* Johnson, 58 Kan. 175, 183, decided in 1897; and the opinion repeats what we have quoted. Although this rule is not accepted by the Supreme Court, which holds that ordinarily, in cases of contracts, *ultra vires*, nothing can be recovered except on a *quantum meruit*, yet it touches, in this suit, a local question, to be determined by local decisions.

The next question is not whether the judgment against the corporation can be impeached, but whether it can be examined for the purpose of showing the nature of the original claim, and thus for the purpose of ascertaining whether the claim was of the class for which stockholders are liable. In suits brought by judgment creditors to set aside alleged fraudulent conveyances, this is permitted.

Bump on Fraudulent Conveyances, 3d ed. 576; Wait on
113 Fraudulent Conveyances, 3d ed., § 270. Of course, with reference to that class of suits, there is often a doubt as to the extent to which the examination may be made: for example, whether or not the statute of limitations can be set up although not relied on in the original suit. This, however, concerns only the ap-

plication of the rule, and does not render its existence doubtful. Its underlying reasons reach suits against stockholders. They are so applied in Cook on Corporations, 4th ed. § 224, where it is said, in substance, that the judgment is conclusive as to the amount and validity of the creditor's claim, but that it may be shown that the claim comes within some class for which stockholders are not liable.

The Supreme Court has, at various times, spoken of the conclusiveness of judgments against corporations in suits to enforce the liability of stockholders; and it has used very decisive language sustaining that conclusiveness, especially in proceedings under the Kansas constitution. Hancock National Bank *v.* Farnum, 176 U. S. 640, 643, 644. No case, however, has come before that court where it has had occasion to lay down more than the general rule to which we have referred; so that it has never passed on the question how far the original judgment may be opened, if at all, for the purpose of showing that the claim was not one of the class for which the stockholder is liable. More especially has it never passed on the question whether or not it is open to a stockholder to show that the contract on which a judgment against a corporation was obtained, was incurred *ultra vires*, and that, therefore, the judgment is not enforceable against him.

This defence would seem not to be open to a stockholder in jurisdictions or with reference to judgments where the rule of the Supreme Court applies, that *ultra vires* is a complete defence in the original action on a contract which is itself *ultra vires;* because, in such cases, the question is not whether there are two classes of liabilities, one for which the stockholder is liable and one for which he is not, but whether there is any liability at all on the part of the corporation. But in Kansas, we have seen that *ultra vires* is
114 not always a defence to a suit on a contract, and this, not on the ground that the contract was originally valid, but on that of estoppel. Therefore, under the circumstances, the question is not whether this original judgment is valid, but whether it was for a claim of a class for which stockholders are liable; in other words, whether the stockholders can be holden for an *ultra vires* contract merely because the corporation is estopped from contesting it.

Not only has the circuit court found that the guaranties sued were *ultra vires*, but the question of *ultra vires* arises on the face of the judgment against the corporation. We have, on the face of the declaration, claims for purely independent guaranties, made by a corporation on securities not negotiated by it, supplemented by such findings by the circuit court as precludes the possibility that there were any facts, as, for example, by-laws not pleaded, or any other facts not disclosed by the declaration, which could relieve the nature of the transaction.

In this connection, it should be observed that the plaintiff refers to certain cases by virtue of which he maintains that there is a presumption that the guaranties were within the powers of the corporation, and of its officers who executed them. These, however, only sustain the rule stated in Express Company *v.* Railroad Company, 99 U. S. 191, 199, and concern merely the question of presumption,

and the necessity of offering proof before a defence is made. They have no relation to a conclusive presumption, nor any pertinency when the true facts of the case are reached, as they are at bar.

This brings us to the crucial question in the case: that is, whether the Kansas constitution and statutes reach that which is created only by estoppel, connected with and arising out of *ultra vires* acts of a corporation. It is well settled that, while the liability of stockholders is in one sense statutory, yet it is contractual in its nature. This was stated in Concord Bank *v.* Hawkins, 174 U. S. 364, and restated in Whitman *v.* Bank, 176 U. S. 559, and in Hancock Bank *v.* Farnum, 176 U. S. 640. The general rule is that, so long as a matter continues executory in any part, *ultra vires* is a de-
115 fence through to the end. It has, also, been stated by the Supreme Court, and reiterated in Concord Bank *v.* Hawkins, at page 371, that one ground on which the doctrine of *ultra vires* rests is "the interest of the stockholders not to be subject to risks which they have never undertaken." To reject in the case at bar the defence of *ultra vires*, set up by a stockholder, is to shut our eyes to this underlying equity.

Inasmuch as constitutional provisions are to be construed in an equitable manner, and for broad purposes, it was well urged by the circuit court that an *ultra vires* guaranty is not within the equity of the article of the Kansas constitution holding stockholders liable for the dues of corporations. We have already seen that the word dues is not limited to debts, but includes all contractual obligations, and this, of course, covers guaranties and other contingent liabilities. We have, also, already seen that it may be broad enough to cover "what ought to be paid; what may be demanded." Whether in the Kansas constitution it covers anything except "contractual obligations" was left undetermined in Whitman *v.* Oxford Bank, 176 U. S. 559, 562. Of course, if the word dues must always be construed to cover everything which "ought to be paid" or which "may be demanded," it would cover everything which arises by estoppel; but, in view of the equities to which we have referred, especially the underlying equity of the doctrine of *ultra vires* stated by the Supreme Court, it ought not to have the effect of holding a stockholder for what is *ultra vires* in all cases where the corporation may be holden therefor by estoppel. It is necessary to express this carefully, because matters may arise from estoppel which are justly and properly "dues" in any fair sense of the word; but where the doctrine of *ultra vires* applies there is no true liability. Whatever liability there may be according to the laws of Kansas, arises from a fiction which estops the corporation from denying that there are dues, even though there were none in truth. A declaration stating the facts would be, in substance, that the corporation had assumed to enter into a contract which was *ultra vires*, and that there
116 was no contract, but that, the transaction having been on one part executed, the corporation is estopped from asserting the truth. Now, fictions of law are not allowed to be used to the extent of doing substantial injustice, and, especially, such fictions have no place in the proper construction of constitutional provisions. In

regard to such, the functions of a judge are "to ascertain the spirit of the fundamental law, and so to carry it out as to avoid a sacrifice of those interests which it is designed to protect." Sedgwick on Statutory and Constitutional Law, 2d ed., 417. On the whole, the reasonable and equitable construction of the Kansas constitutional provision applicable here is that it does not reach what, in fact, were not liabilities of a corporation, and are held to be such only because the corporation was estopped from setting up the truth in reference to them.

In reaching these conclusions, we have not found it necessary to refer to Schrader *v.* Manufacturers' National Bank, 133 U. S. 67, relied on by the defendant, because its application to this case is questionable. Neither have we found it necessary to refer to the rule so often stated, to the effect that enactments imposing liabilities on officers and stockholders are to be strictly construed, in connection with the rule in Kansas that this insistence of the common law shall not be applicable to any general statutes. General Statutes, 1889, par. 7281. We have only endeavored, in ascertaining what is the effect of the constitution and laws of Kansas, to seek a just and reasonable interpretation.

A single point remains to be considered. It appears that the plaintiff made a motion for a new trial, offering proof to show that the notes guarantied by the corporation were, in fact, its notes, and were negotiated by it at the time the guaranties were made, and that their nominal owner held them as its trustee. We do not perceive that any action was taken on this motion, and the record does not show that it was brought to the attention of the court. Whether or not the suggestion which it contains affords an opportunity for the plaintiff to seek further remedy is, perhaps, not before us. There seems to be no doubt that, in a plain case of injustice, an appellate tribunal may reverse the judgment of the court below, to enable it to take further proceedings, for the purpose of working out the real rights of the parties, although this is rarely done. Estho *v.* Lear, 7 Pet. 130; Ballard *v.* Searles, 130 U. S. 50; *In re* Gamewell Co., 73 Fed. Rep. 908, 912, decided by this court. The record here does not authorize such relief. If the plaintiff has any remedy in connection with this new matter, it is for him to consider whether it could be obtained by asking of this court leave to file in the circuit court an application in review of the proceedings. *In re* Gamewell Co. Inasmuch as the new matter which the plaintiff offered apparently contradicts the legal intendment of the declaration in the suit against the corporation, as we have already said, it may be especially doubtful whether, in any event, he could have any remedy in any direction.

117 & 118

The judgment of the circuit court is affirmed, with costs to defendant in error.

119&120 United States Circuit Court of Appeals for the First Circuit, October Term, 1900.

H. L. WARD, Treasurer, Plaintiff, Plaintiff in Error,
v.
EDWARD JOSLIN, Defendant, Defendant in Error. } No. 340.

Judgment in Circuit Court of Appeals.

December 6, 1900.

This cause came on to be heard October 3, 1900, upon the transcript of the record of the circuit court of the United States for the district of New Hampshire, and was argued by counsel.

On consideration whereof, it is now, to wit, December 6, 1900, here ordered, adjudged and decreed, as follows: The judgment of the circuit court is affirmed, with costs to the defendant in error.

By the court:

JOHN G. STETSON, *Clerk.*

121 United States Circuit Court of Appeals for the First Circuit, October Term, 1900.

H. L. WARD, Treasurer, Plaintiff, Plaintiff in Error,
v.
EDWARD JOSLIN, Defendant, Defendant in Error. } No. 340.

Petition of Plaintiff in Error for Rehearing.

Respectfully represents Henry L. Ward, treasurer, the plaintiff in error, that in the above-entitled case a hearing was had in this court on October 3, A. D. 1900, before Judges Colt, Putnam, and Brown, and afterwards, to wit, on December 6, 1900, judgment was rendered against him for the reasons set forth in the opinion of the court as filed in the case.

And your petitioner is advised that there are several important points which have not been fully argued by counsel nor considered by the court; wherefore your petitioner prays that he may be granted a rehearing.

The grounds upon which your petitioner bases his petition are as follows:

I.

Because this court in the decision of this case has assumed that there was evidence in the record to support the finding of the
122 circuit court, that the guaranties of the Western Investment Loan and Trust Company upon which the plaintiff's claim is based were *ultra vires;* whereas there is no evidence in the case to warrant a finding that such guaranties were *ultra vires.* This question arises under the plaintiff's fourth assignment of error (Record, p. 17), which is an exception to the refusal of the circuit court to rule that,—"The guaranties of said corporation which are de-

clared on in the plaintiff's second, fourth, and sixth causes of action in his suit against said corporation, as appears from the record in evidence, were not *ultra vires* or beyond the power of said corporation to make."

II.

Because this court has the right and duty to inspect the evidence in the record for the purpose of ascertaining whether or not the findings of the circuit court are sustained by sufficient legal evidence, under said fourth assignment of error, and also under the plaintiff's first assignment of error (Record, p. 16), which is an exception to the refusal of the circuit court to rule that,—"Upon all the evidence in the case the plaintiff is entitled to recover as a matter of law, and a finding should be made for the plaintiff for the full sum claimed in his declaration."

An inspection of the evidence by this court would show that there was no evidence that these guaranties were *ultra vires* or were not "within the reasonable and proper scope of the business as contemplated by the parties."

III.

Because there is no claim by the defendant in error of any evidence that the guaranties were *ultra vires*, except what appears in the record of the plaintiff's judgment against the trust company, wherein the plaintiff's declaration shows that the notes were payable to and endorsed by one Ethell, and were guaranteed by the trust company; but that record does not show whether or not Ethell negotiated these notes solely for his own benefit, or only as trustee for and for the benefit of the trust company. There is no
123 evidence to show that he did not negotiate these notes for the benefit of the trust company; and it is the well-established rule of law that "when a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contract, be presumed to be valid."

IV.

Because the plaintiff in error desires to call to the court's attention the proposition of law that a guaranty by the trust company of notes negotiated by Ethell as its trustee and for its benefit, would be of the same legal effect as the guaranty of notes negotiated by the trust company, and would not be *ultra vires*.

V.

Because the plaintiff in error desires to call to the court's attention a well-established rule of law that "acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter."

In the light of this rule of law, it was not necessary for the plaintiff to offer evidence additional to the record of his judgment against the trust company, in order to show that he had valid claims against the trust company on its guaranties. If, in order to sustain

the legality of those guaranties by the trust company, other facts must exist, such as the fact that Ethell negotiated the notes guaranteed only as trustee for and for the benefit of the trust company, then those facts are presumptively proved by the act of the trust company in making the guaranties. It is presumed that the company acted lawfully and not *ultra vires*.

VI.

Because this court in the decision of this case has held that the plaintiff in error was not a purchaser for value without notice; whereas the record shows that the plaintiff is a holder for value and before maturity (Record, p. 80) and in the absence of evi-
124 dence affecting the validity of the guaranties, he is presumed to be a *bona fide* holder.

VII.

Because this court, in holding that a judgment against the trust company on the ground of estoppel is not conclusive on the defendant, as an admitted stockholder, has failed to give force and effect to the judicial proceedings of the Kansas court, and has departed from the reasoning of the Supreme Court of the United States, which holds that a judgment against the corporation is conclusive on the stockholder, in cases to enforce a stockholder's liability.

The decisions of the Supreme Court upon this point are based on the reasoning that a stockholder is bound by a decree or judgment against the corporation "through representation by the company," and he "is so far an integral part of the corporation, that, in the view of the law, he is privy to the proceedings touching the body of which he is a member." Upon this reasoning the stockholder, as well as the corporation, would be estopped from contesting the plaintiff's claim.

VIII.

Because this court has failed to give effect to the decisions of the Supreme Court of the United States that a judgment "is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it."

"What is implied in a record, pleading, will, deed, or contract, is as effectual as what is expressed."

IX.

Because the decision of this court permits the defendant, under the guise of examining the plaintiff's claim against the corporation, to allege that the plaintiff has no valid claim against the corporation, and without proof to impeach the plaintiff's judgment against the corporation.

125 X.

Because the record of the plaintiff's judgment against the trust company shows that the transaction with the plaintiff was for the

benefit of the trust company and not of Ethell. That record shows that the notes in question were endorsed by Ethell "without recourse" (Record, p. 87); "that at the time of the endorsement of said notes to this plaintiff," the trust company guaranteed the payment of them for value (p. 80); that they were payable at the office of the trust company (p. 86); that the mortgage deed given to secure the notes ran to a trustee for the benefit of the trust company (pp. 88–90); and that the trust company had the exclusive right to declare the notes due upon any default, to demand the foreclosure of the mortgage, and to receive the proceeds of the mortgage, after the costs of foreclosure, to protect it on the guaranties.

The Supreme Court of the United States has held that there is no inference that an endorsement "without recourse" is for value paid to the endorser. The guaranties are expressed to be for a valuable consideration. It is a fair inference from the foregoing facts that the value was paid to the trust company at the time these notes were negotiated and guaranteed, and that the trust company was the party beneficially interested in the transaction. The vote of the directors (Record, p. 55) authorized the guaranty of "securities negotiated by the company." The presumption must be that these securities were really negotiated by the company, in the absence of evidence to the contrary. They are endorsed "Negotiated by the Western Investment Loan and Trust Company, Topeka, Kansas" (p. 87).

XI.

Because the plaintiff in error desires to call the court's attention to an important amendment to the corporation act of Kansas, which has not been brought to the notice of the court.

Chapter 23, article 3, section 15, of the Compiled Laws of Kansas of 1885 is as follows:

126 "SECTION 15. Corporations shall have power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, and may execute bonds or promissory notes therefor, and may pledge the property and income of the corporation."

This was amended by chapter 109, section 1, of the Laws of Kansas for 1889, by adding thereto the following: "Provided, however, that the provisions of this section shall not apply to the debentures or bonds of any loan or trust company, duly incorporated under the provisions of this chapter, the payment of which debentures or bonds shall be secured by a transfer of real estate or by other securities for the benefit and protection of purchasers of said debentures or bonds; such collaterals to be at least equal in amount to the par value of such bonds or debentures, and all real-estate mortgage securities to be first liens on the property on which loans are made."

This act recognizes and ratifies the right of loan and trust companies to issue debenture bonds secured by first mortgages on real estate. There is no real distinction between such debenture bonds and the guaranties of the trust company in this case. The guaranties are obligations in the name of the trust company, secured by a real-estate mortgage, and also by the signatures of the makers of the

notes. That act took effect on March 14, 1889. The guaranties were made on May 9, 1889 (Record, p. 87), and were therefore fully authorized by that act.

127 & 128 Wherefore your petitioner prays that he may be granted an opportunity of presenting authorities in support of the above grounds for rehearing.

HENRY L. WARD, *Treasurer*,
By his attorney, WILLIAM REED BIGELOW.

I hereby certify that this petition for rehearing is in my opinion well founded in law, and proper to be filed in said cause, and is not intended for delay.

WILLIAM REED BIGELOW.

129 United States Circuit Court of Appeals for the First Circuit, October Term, 1900.

H. L. WARD, Treasurer, Plaintiff, Plaintiff in Error,
v.
EDWARD JOSLIN, Defendant, Defendant in Error. } No. 340.

Order of Court.

January 16, 1901.

The court having carefully considered the petition of the plaintiff in error for a rehearing, and no judge who concurred in the judgment desiring a reargument, it is ordered that a rehearing will not be granted, that the petition is denied, and that a mandate issue forthwith.

By the court,

JOHN G. STETSON, *Clerk.*

Order of Court.

January 17, 1901.

Upon the petition of the plaintiff in error for a stay of the mandate pending certiorari proceedings, it is ordered that the mandate be stayed till further order of court.

By the court,

JOHN G. STETSON, *Clerk.*

130 United States Circuit Court of Appeals for the First Circuit, October Term, 1900.

H. L. WARD, Treasurer, Plaintiff, Plaintiff in Error,
v.
EDWARD JOSLIN, Defendant, Defendant in Error. } No. 340.

Clerk's Certificate.

I, John G. Stetson, clerk of the United States circuit court of appeals for the first circuit, certify that the printed pages, numbered

1 to 103, inclusive, hereto prefixed, contain and are a true copy of the writ of error to the circuit court of the United States for the district of New Hampshire, and the return of said circuit court thereon, in the cause entitled in said circuit court,

H. L. WARD, Treasurer, Plaintiff,
v.
EDWARD JOSLIN, Defendant. } No. 428, Law Docket.

I further certify that said printed pages, numbered 1 to 103, inclusive, contain and are a true copy of the record upon which the said cause was heard in said circuit court of appeals, October 3, 1900.

I further certify that the printed pages, numbered 107 to 117, inclusive, hereto prefixed, contain and are a true copy of the opinion of said circuit court of appeals in said cause, and that the printed page, numbered 119, contains and is a true copy of the final judgment entered in said cause, December 6, 1900.

I further certify that the printed pages, numbered 121 to 129, inclusive, hereto prefixed, contain and are true copies of the petition of the plaintiff in error for a rehearing, and of the orders of court denying said petition and staying the mandate pending certiorari proceedings.

I further certify that said printed pages, numbered 1 to 129, inclusive, contain and are a true copy of the record and all proceedings in said cause in said circuit court of appeals, to and including January 15, 1901, and that a mandate has not issued.

Seal United States Circuit Court of Appeals, First Circuit.

In testimony whereof, I hereunto set my hand and affix the seal of said United States circuit court of appeals for the first circuit, at Boston, in said first circuit, this fifteenth day of January, A. D. 1901.

JOHN G. STETSON, *Clerk.*

130½ [Endorsed:] File No. 18,043 U. S. C. C. of appeals 1st circuit. Term No. 245. Henry L. Ward, treasurer, petitioner, *vs.* Edward Joslin—Filed February 1st 1901.

131 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the first circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which H. L. Ward, treasurer, is plaintiff in error, and Edward Joslin, is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of New Hampshire, and we, being willing for certain reasons that the said cause and the

record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court
132 of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the seventh day of March, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Return on Writ of Certiorari.

United States Circuit Court of Appeals for the First Circuit.

And now here the judges of the United States circuit court of appeals for the first circuit make return of this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued, "that the certified transcript of the record and proceedings in this cause already filed in the Supreme Court of the United States by Henry L. Ward, treasurer, with his petition for a writ of certiorari in the cause of Henry L. Ward, treasurer, petitioner, *vs.* Edward Joslin, respondent, numbered 558 of the October term of that court for 1900, may be taken as the return of the writ of certiorari issued by the Supreme Court of the United States in that cause on the 7th day of March, A. D. 1901."

Seal United States Circuit Court of Appeals, First Circuit.

In testimony whereof I, John G. Stetson, clerk of said United States circuit court of appeals for the first circuit, hereto set my hand and affix the seal of said court at Boston, in said first circuit, this twentieth day of March, 1901.

JOHN G. STETSON, *Clerk.*

133 United States Circuit Court of Appeals for the First Circuit, October Term, 1899.

H. L. WARD, Treasurer, Plaintiff, Plaintiff in Error,
vs.
EDWARD JOSLIN, Defendant, Defendant in Error. } No. 340.

Stipulation.

It is hereby agreed between the parties to the above-entitled cause that the certified transcript of the record and proceedings in this cause already filed in the Supreme Court of the United States by Henry L. Ward, treasurer, with his petition for a writ of certiorari in the cause of Henry L. Ward, treasurer, petitioner, *vs.* Edward Joslin, respondent, numbered 558 of the October term of that court for 1900, may be taken as the return to the writ of certiorari issued

by the Supreme Court of the United States in that cause on the 7th day of March, A. D. 1901, to the judges of the United States circuit court of appeals for the first circuit.

WILLIAM REED BIGELOW,
Attorney for Henry L. Ward, Treasurer.
J. S. H. FRINK,
Attorney for Edward Joslin.

134 [Endorsed:] File No. 18,043. Supreme Court of the United States. No. 245, October term, 1901. H. L. Ward, treasurer, *vs.* Edward Joslin. Writ of certiorari, and return of United States circuit court of appeals for the first circuit thereon. Filed Mar. 22, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

PETITION OF HENRY L. WARD, TREASURER, FOR WRIT OF CERTIORARI.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of Henry L. Ward, Treasurer, of Burlington, in the State of Vermont, for a writ of certiorari to the judges of the United States Circuit Court of Appeals for the First Circuit to bring before the Supreme Court of the United States a certain action of debt pending in and lately decided by said Circuit Court of Appeals, wherein said Henry L. Ward, treasurer, is plaintiff in error, and Edward Joslin, of Keene, in the State of New Hampshire is defendant in error, respectfully shows as follows:

First. The case referred to is numbered 340 on the docket of said Circuit Court of Appeals, and is entitled,

HENRY L. WARD, Treasurer, Plaintiff,
Plaintiff in Error,

v.

EDWARD JOSLIN, Defendant,
Defendant in Error.

The printed record of said case herewith submitted is cited and referred to in this petition.

Second. Said suit was begun by attachment on a writ and declaration in an action of debt on December 15, 1896, and was entered in the Circuit Court of the United States for the District of New Hampshire, on May 8, 1897. The petitioner is a judgment

creditor of The Western Investment Loan and Trust Company (hereinafter referred to as the Trust Company), a corporation organized under the laws of the State of Kansas for the purposes set forth in its charter (Record, p. 38), as follows: "To buy and sell personal property, including stocks, bonds, bills, notes, real and chattel mortgages, and choses in action of every kind and description, and to transact the business of a loan and trust company."

Third. The petitioner recovered judgment against said Trust Company by default after due service on the president of the corporation (Record, p. 93), upon the guaranty of three notes for twenty-five hundred dollars each. These notes were made by S. S. Hite and his wife, dated September 12, 1888, and payable on September 12, 1892, to one J. E. Ethell, at the office of the Trust Company in Topeka, Kansas (Record, p. 86). They were endorsed to the petitioner by Ethell "without recourse" and at the same time (p. 80) were guaranteed by the Trust Company as follows (p. 87):

"TOPEKA, KANSAS, May 9, A.D. 1889.

"For a valuable consideration, The Western Investment Loan and Trust Company hereby guarantees payment of the within obligation, both principal and interest, at maturity.

"THE WESTERN INVESTMENT LOAN AND TRUST COMPANY,
"By L. L. TURNER,
"*President.*

"Attest:
"SAMUEL T. HOWE,
Secretary.

"Negotiated by The Western Investment Loan and Trust Company, Topeka, Kansas."

Fourth. These three notes were secured by a trust deed from S. S. Hite and wife to one C. F. Jilson, as trustee, and the Trust Company as a third party (Record, pp. 88–91). The Trust Company had the exclusive right under this deed to declare the notes

due upon any default, to demand the foreclosure of the mortgage by Jilson, and to receive the proceeds of the mortgage to protect it on its guaranties.

Fifth. The directors of the Trust Company had a meeting on August 7, 1888, and voted that the president and secretary be authorized to guarantee the payment of all securities negotiated by the company in one of three forms (p. 55), the second of which was identical with the guaranty on the above notes, excepting that Form 2 authorized the guaranty of payment "within days after maturity" instead of "at maturity" as appeared in the notes.

Sixth. The petitioner recovered judgment against the Trust Company on the guaranties of the above three notes on March 7, 1893 (Record, p. 96), in the District Court, of Smith county, in Kansas, and thereafter execution was duly issued against the Trust Company and returned wholly unsatisfied (Record, p. 100).

He now seeks to hold the respondent liable as a stockholder in the Trust Company under paragraph 1192 of the General Statutes of Kansas for 1889, which is as follows:

"1192. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

Seventh. The respondent admitted in his deposition that he purchased one hundred shares of the Trust Company in 1888 of a par value of fifty dollars a share (p. 64, Int. 3, 4); that on June 9, 1894, he transferred these shares to Frederick E. Kingsbury (p. 64, Int. 5, 6), who was his grandson (pp. 73, 74, Int. 2); that

this transfer was without any consideration (p. 69, Cross-Int. 39); that his grandson at that time had no visible attachable property (p. 69, Cross-Int. 44, 45), and had none at the time of this action (p. 69, Cross-Int. 45, 46; p. 76, Cross-Int. 32); that he knew business was oppressed in 1893 and 1894, and Kansas companies stopped paying dividends and as a general thing had to succumb (p. 72, Cross-Int. 75, 76, 79, 80); that he would suspect something was wrong if any company passed its dividends (p. 67, Cross-Int. 15, 16, 17, 18); that he received no dividends from the Trust Company after July 1, 1890 (p. 66, Cross-Int. 4; p. 67, Cross-Int. 8, 9, 10, 11); that he had already been sued on his Kansas stockholder's liability in another company before he transferred these shares (p. 65, Int. 20, 21, 22); and that he transferred these shares "to avoid expense of defending suits and trouble," and considered there was value in the stock, and he had rather the value of the stock should go to his family than to expend it in defending suits (p. 65, Int. 20, 21, 22; p. 68, Cross-Int. 28, 29, 33, 34, 35).

James A. Troutman, the president of the Trust Company, testified that the company was insolvent on January 1, 1891, and since that time (Record, p. 43, Int. 34, 35); and that it issued no financial statement later than August 26, 1891 (p. 44, Int. 40, 41, 42). This evidence was not contradicted.

Eighth. Upon the foregoing testimony and admissions of the respondent and his grandson, the Circuit Court found as a fact "that the transfer was not such a *bona fide* transfer as to relieve the defendant from his individual liability as a stockholder if he were otherwise liable" (Record, p. 7). The respondent conceded this also at the argument in the Court of Appeals.

Ninth. The record evidence in the case consisted of the charter (p. 38), by-laws (pp. 50–53), and minutes (pp. 53–60), of the Trust Company, and the petitioner's judgment and execution against that company (pp. 79–101). The other evidence consisted of the depositions of the respondent and his grandson, and the deposition of James A. Troutman, the president of the Trust Company, identifying the by-laws and minutes. This was all the evidence in the case. There was no evidence in the depositions in any way tending to show that the guaranties, upon which

the petitioner's judgment against the Trust Company was based, were *ultra vires.*

Tenth. A jury trial was expressly waived in the Circuit Court (Record, p. 6). At the argument upon the evidence and the law in the Circuit Court, and before the findings of that court, the petitioner presented five separate requests for rulings of law by the court, as follows (Record, p. 11):

1. Upon all the evidence in the case the plaintiff is entitled to recover as a matter of law, and a finding should be made for the plaintiff for the full sum claimed in his declaration.

2. The execution in evidence in this case is an execution against the effects of a corporation within the meaning of paragraph 1192 of the General Statutes of Kansas, 1889.

3. The judgment and execution against The Western Investment Loan and Trust Company, in evidence, are included in the word "dues" in Article 12, Section 2, of the Constitution of Kansas, and constitute such a "due" as is secured by the individual liability of stockholders in corporations organized under the laws of Kansas.

4. The guaranties of said corporation, which are declared on in the plaintiff's second, fourth, and sixth causes of action in his suit against said corporation, as appears from the record in evidence, were not *ultra vires*, or beyond the power of said corporation to make.

5. If the Court finds that said guaranties of said corporation were *ultra vires* and beyond the power of said corporation to make, that is no defence in this action.

The Circuit Court considered these propositions and declined to adopt them in the decision of this case, whereupon the petitioner duly excepted to this refusal of the Court, and these exceptions were allowed (Record, pp. 10–15).

Eleventh. The Circuit Court found as facts (Record, p. 7) that the respondent was a stockholder; that the petitioner had a valid judgment against the Trust Company with execution thereon returned wholly unsatisfied; and that the petitioner's "claim against the Trust Company was upon a guaranty, given upon a valuable consideration, of the payment of certain promissory notes from one third party to another, and was not a guaranty of the payment of securities negotiated by the company."

The Circuit Court further found (p. 8) that this guaranty was not within the scope of the business of the Trust Company, and "was not intended by the defendant stockholder, and was not contemplated by the Kansas Constitution as a due or debt within such scope," and made a general finding for the respondent.

Twelfth. The Circuit Court also made a declaration of law (Record, p. 20).

Thirteenth. The petitioner thereupon filed a motion for a new trial in order that he might show "that the guaranties, upon which the plaintiff's judgment against said corporation was founded, were guaranties of obligations really owned by said corporation and negotiated by it" (Record, p. 9), and that the notes were made payable to Ethell "only nominally and for the convenience of said corporation, and as trustee for said corporation." The Circuit Court denied this motion for a new trial (Record, p. 10).

Fourteenth. Judgment for the respondent was entered in the Circuit Court on May 7, 1900, and on May 8, 1900, the petitioner filed his petition for a writ of error in the Circuit Court and with the same an assignment of errors, upon which petition a writ of error issued on May 16, 1900, and was duly entered in the United States Circuit Court of Appeals for the First Circuit, all of which appears by the printed record in said case (Record, pp. 1, 2, 14–19, 24).

Fifteenth. A hearing was had upon said case in said Circuit Court of Appeals on October 3, 1900, before Judges Colt, Putnam, and Brown, and on December 6, 1900, judgment was rendered against your petitioner, for the reasons set forth in the opinion of the Court which is shown in the printed record (pp. 107–117).

Sixteenth. On December 24, 1900, the petitioner filed a petition for a rehearing upon eleven grounds (Record, pp. 121–128), which are comprised in the following points:

1. Because the Court of Appeals in its decision assumed that there was evidence in the record to support the finding of the Circuit Court that the guaranties of the Trust Company, upon which the plaintiff's judgment was based, were *ultra vires*, whereas there is no evidence whatever in the case tending to show that they were *ultra vires*.

2. Because the Court of Appeals failed to inspect the evidence

for the purpose of ascertaining whether or not there was any evidence of *ultra vires* as required by the plaintiff's first and fourth assignments of error.

3. Because the record of the plaintiff's judgment against the Trust Company does not show that these guaranties were necessarily *ultra vires*, and every presumption should be made in support of that judgment.

4. Because the record of the plaintiff's judgment against the Trust Company shows affirmatively that the notes were negotiated for the benefit of the Trust Company and not of Ethell, and the guaranty of notes negotiated by a trustee for the benefit of the Trust Company would not be *ultra vires*.

5. Because the plaintiff in error is a holder for value and before maturity and is presumed to be a *bona fide* holder.

6. Because the decision of the Court of Appeals is contrary to the repeated decisions of this court, and in particular to the decision of this court in the case of Hancock National Bank *v.* Farnum, 176 U.S. 640, and is not supported by any authorities.

7. Because the decision of the Court of Appeals permits the defendant in error, under the guise of examining the plaintiff's claim against the corporation, to allege that the plaintiff has no valid claim against the corporation, and without proof to impeach the plaintiff's judgment against the corporation.

8. Because under the laws of Kansas the Trust Company had the power to guarantee the payment of obligations secured by real estate, and the legislature of Kansas has recognized and ratified this right by the passage of Chapter 109, Section 1, of the laws of Kansas for 1889.

Chapter 23, Article 3, Section 15, of the complied laws of Kansas of 1885, is as follows: "Section 15. Corporations shall have power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, and may execute bonds or promissory notes therefor, and may pledge the property and income of the corporation."

This was amended by Chapter 109, Section 1, of the laws of Kansas for 1889, by adding thereto the following: "Provided, however, that the provisions of this section shall not apply to the debentures or bonds of any loan or trust company, duly incorporated under the provisions of this chapter, the payment of which

debentures or bonds shall be secured by a transfer of real estate or by other securities for the benefit and protection of purchasers of said debentures or bonds: such collaterals to be at least equal in amount to the par value of such bonds or debentures, and all real estate mortgage securities to be first liens on the property on which loans are made."

On January 16, 1901, said petition for rehearing was denied by the Circuit Court of Appeals.

On January 17, 1901, your petitioner filed a petition asking for a stay of mandate pending certiorari proceedings, and the mandate was stayed until the further order of the Court.

Seventeenth. Your petitioner bases his request for the issuance of the writ of certiorari upon the following grounds:

I.

Because this is a case of peculiar gravity and of general importance for the reason that the United States Circuit Court of Appeals for the First Circuit has absolutely declined to adopt and follow rulings of law established by this court in each instance by repeated decisions, upon the following points:

1. Exceptions to the rulings of the court, where jury trial is waived, upon propositions of law duly presented to the court and considered before the finding, are properly presented to the Circuit Court of Appeals in a bill of exceptions duly allowed by the Circuit Court.

2. The refusal of the Circuit Court to rule that upon all the evidence in the case the plaintiff is entitled to recover as a matter of law, when application for such ruling is made before the finding of the court, raises a question of law, which, if exception is taken and preserved in a bill of exceptions, presents a question of law for the decision of the Circuit Court of Appeals.

3. A "judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it."

4. A stockholder "is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member," and a judgment against

the corporation is binding on its stockholders in the absence of fraud and collusion.

5. "The power which can give authority to act can ratify any act that is taken, and generally legislative recognition of an act or a corporation validates the act or the corporation, although neither one nor the other may have had full prior legal authority."

6. "When a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contrary, be presumed to be valid."

7. A holder of negotiable paper for value and before maturity is presumed to be a *bona fide* holder.

8. "Acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter."

Either of the first two points establishes the right of the petitioner to be heard in the Circuit Court of Appeals upon the other propositions. If any one of the remaining six propositions of law had been adopted and applied to this case by the Circuit Court of Appeals the petitioner would have been entitled to a new trial or to a judgment on the facts found.

The decisions of this court establishing these propositions of law, with their application to this case, are presented in the brief of your petitioner submitted herewith.

II.

Because the Court of Appeals rested its decision against your petitioner upon the sole ground that the guaranties of the Trust Company, upon which his judgment against that company was recovered, were *ultra vires;* whereas there is no evidence in the case tending to show that those guaranties were *ultra vires.* Your petitioner raised this question by requests for rulings which are embodied in the bill of exceptions (Record, p. 11), and in the first and fourth assignments of error (Record, pp. 16–17), as exceptions to the refusal of the Circuit Court to rule as follows:

1. Upon all the evidence in the case the plaintiff is entitled to recover as a matter of law, and a finding should be made for the plaintiff for the full sum claimed in his declaration.

4. The guaranties of said corporation, which are declared on in the plaintiff's second, fourth, and sixth causes of action, in his suit against said corporation, as appears from the record in evidence, were not *ultra vires* or beyond the power of said corporation to make.

The Court of Appeals did not inspect the record for the purpose of ascertaining whether or not there was any evidence to show that the guaranties were *ultra vires*, but in the opinion says (Record, p. 114): "We have, on the face of the declaration, claims for purely independent guaranties, made by a corporation on securities not negotiated by it, supplemented by such findings by the Circuit Court as precludes the possibility that there were any facts, as, for example, by-laws not pleaded, or any other facts not disclosed by the declaration, which could relieve the nature of the transaction." Again the Court says: "They have no relation to a conclusive presumption, nor any pertinency when the true facts of the case are reached, as they are at bar."

It is obvious that such a decision is a great injustice, if there is no legal evidence in the case tending to show *ultra vires*. It was the duty of the court to inspect the evidence and pass upon the errors assigned by the petitioner. Such exceptions raise questions of law, as this court has repeatedly decided.

III.

Because the facts specially found by the Circuit Court (Record, p. 7) were not sufficient to support a judgment for the respondent, but required a judgment for the petitioner, in accordance with the repeated decisions of this Court and of the Supreme Court of Kansas, that a judgment against a corporation is conclusive on the stockholder in the absence of fraud and collusion.

Wherefore your petitioner prays that a writ of certiorari may be issued from this court to said United States Circuit Court of Appeals for the First Circuit, and that the record therein of the case above referred to may be thereby brought before this court, and that this court will consider the same and will grant such other and further relief as law and justice may require.

HENRY L. WARD,
Treasurer.

UNITED STATES OF AMERICA,
STATE AND DISTRICT OF VERMONT.
CHITTENDEN, SS.

BURLINGTON, Jan 29, 1901.

Personally appeared before me, a Notary Public, within and for said County and State, the above-named Henry L. Ward, Treasurer, and made due oath that the allegations of the foregoing petition subscribed by him are true to the best of his knowledge, information, and belief.

Witness my hand and notarial seal at said Burlington, the day and year above written.

George H. Marsh.
Notary Public.

I, William Reed Bigelow, having been duly admitted to practice in the Supreme Court of the United States, as an attorney and counsellor of the court, do hereby certify that the foregoing petition for a writ of certiorari has been examined by me and that in my opinion, for the reasons therein set forth, the writ ought to issue as prayed for.

WILLIAM REED BIGELOW.

BOSTON, MASSACHUSETTS,
JANUARY 22, 1901.

Supreme Court of the United States.

October Term, 1900. No. 558.

HENRY L. WARD, TREASURER, *Petitioner*,

v.

EDWARD JOSLIN, *Respondent*.

IN THE MATTER OF THE PETITION OF

HENRY L. WARD, TREASURER,

FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF IN SUPPORT OF PETITION

STATEMENT OF THE CASE.

THIS is a suit by a judgment creditor of a corporation organized under the laws of Kansas to enforce against a stockholder in that corporation the liability prescribed by Article XII., Section 2, of the Constitution of Kansas, and by paragraph 1192 of the General Statutes of Kansas of 1889.

Article XII., Section 2, of the Constitution of Kansas is as follows: —

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; and such individual liability shall not apply to railroad corporations nor corporations for religious or charitable purposes."

Paragraph 1192 is as follows: —

"If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

The Western Investment Loan and Trust Company (hereinafter referred to as the Trust Company) was not a railway or a religious or charitable corporation, but was organized for the purposes set forth in its charter (Record, p. 38) as follows: "To buy and sell personal property, including stocks, bonds, bills, notes, real and chattel mortgages, and choses in action of every kind and description, and to transact the business of a loan and trust company."

This case was begun on December 15, 1896, by an attachment in an action of debt, and was entered in the Circuit Court of the United States for the District of New Hampshire on May 8, 1897. The petitioner was the original plaintiff. The respondent in his answer set up "that the claim against the Trust Company, upon which a judgment in favor of the plaintiff against said company was founded, was not a due from or debt of said corporation for which the defendant as a stockholder in said corporation was liable under the constitution and laws of Kansas" (Record, pp. 36, 37); and also that the Trust Company "never had any authority to endorse the said promissory notes and obligations in the second count in plaintiff's declaration described or to guarantee the payment of said notes and obligations" (p. 37). The petitioner seeks to recover only on the first count of his declaration (Record, pp. 29–31).

The respondent testified that he became the owner in 1888 of one hundred shares of the Trust Company of a par value of fifty dollars each, and transferred them in 1894 to his grandson, without consideration, and under circumstances which showed that the transfer was colorable (Petition, paragraph 7). The Circuit Court found as a fact "that the transfer was not such a *bona fide* transfer as to relieve the defendant from his individual liability as a stockholder if he were otherwise liable" (Record, p. 7).

The petitioner's judgment against the Trust Company was recovered upon the guaranty of three notes of twenty-five hundred dollars each. These notes were made by S. S. Hite and his wife, dated September 12, 1888, and payable on September 12, 1892, to J. E. Ethell at the office of the Trust Company in Topeka, Kans. (Record, p. 86). They were endorsed to the petitioner by Ethell "without recourse," and at the same time (p. 80) were guaranteed by the Trust Company as follows (p. 87):—

"TOPEKA, KANS., May 9, A.D. 1889.

"For a valuable consideration, The Western Investment Loan and Trust Company hereby guarantees payment of the within obligation, both principal and interest at maturity.

"THE WESTERN INVESTMENT LOAN AND TRUST COMPANY,

"By L. L. TURNER, *President*.

"Attest: SAM'L T. HOWE, *Secretary*.

"Negotiated by The Western Investment Loan and Trust Company, Topeka, Kans."

These three notes were secured by a trust deed from S. S. Hite and wife to one C. F. Jilson as trustee, and the Trust Company as a third party (Record, pp. 88–91). The Trust Company had the exclusive right under this deed to declare the notes due upon any default, to demand the foreclosure of the mortgage by Jilson, and to receive the proceeds of the mortgage to protect it on its guaranties.

The directors of the Trust Company had a meeting on August 7, 1888, and voted that the president and secretary be authorized to guarantee the payment of all securities negotiated by the company in one of three forms (Record, p. 55), the second of which was identical with the guaranty on the above notes, excepting that Form 2 authorized the guaranty of payment "within days after maturity" instead of "at maturity" as appeared in the notes.

Due service of the petitioner's writ was made on the president of the Trust Company (Record, pp. 7, 93), and judgment was recovered by default on March 7, 1893, in the District Court of Smith County in Kansas, for $9,787.50 and interest at 12 per cent. (p. 96). A payment was made on December 11, 1893, of $4,924.75. An execution issued for the balance and on October 31, 1896, was returned wholly unsatisfied (p. 100). No evidence of *ultra vires* was offered by the respondent, and none appeared except what may be argued from the record of the petitioner's judgment against the Trust Company.

The Circuit Court made a finding of facts (Record, pp. 7, 8), that the petitioner had a valid judgment against the Trust Company with execution thereon returned wholly unsatisfied; that the respondent was a stockholder for five thousand dollars; that the petitioner's judgment was based "upon a guaranty, given upon a valuable consideration, of the payment of certain promissory notes from one third party to another, and was not a guaranty of the payment of securities negotiated by the company"; that this guaranty was not within the scope of the business of the Trust Company; and made a general finding for the respondent.

At the argument and before the findings of the Circuit Court the petitioner presented to the court in a printed brief five propositions of law and requested the ruling of the court thereon. The court considered these propositions but declined to give them, as appears from the declaration of law (Record, pp. 20–22), and the petitioner then excepted to the refusal of the court to adopt them in this case, and these exceptions were allowed (Record, pp. 10–14).

Assignments of Error.

The assignments of error which are material to this petition are as follows (Record, pp. 16, 17, 19): —

1. The Circuit Court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that —

"Upon all the evidence in the case the plaintiff is entitled to recover as a matter of law, and a finding should be made for the plaintiff for the full sum claimed in his declaration."

2. The Circuit Court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that —

"The execution in evidence in this case is an execution against the effects of a corporation within the meaning of paragraph 1192 of the General Statutes of Kansas, 1889."

3. The Circuit Court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that —

"The judgment and execution against The Western Investment Loan and Trust Company in evidence are included in the word 'dues' in Article XII., Section 2, of the Constitution of Kansas, and constitute such a 'due' as is secured by the individual liability of stockholders in corporations organized under the laws of Kansas."

4. The Circuit Court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that —

"The guaranties of said corporation, which are declared on in the plaintiff's second, fourth and sixth causes of action in his suit against said corporation, as appears from the record in evidence, were not *ultra vires* or beyond the power of said corporation to make."

5. The Circuit Court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that—

"If the court finds that said guaranties of said corporation were *ultra vires* and beyond the power of said corporation to make, that is no defence in this action."

13. The Circuit Court erred in not giving full faith and credit to the plaintiff's judgment and execution against The Western Investment Loan and Trust Company in evidence, as required by Article IV., Section 1, of the Constitution of the United States, and Section 905 of the Revised Statutes of the United States.

14. The Circuit Court erred in ruling that the facts specially found by the Court were sufficient to support a judgment for the defendant.

15. The Circuit Court erred upon the face of the record in entering judgment for the defendant.

Grounds for Requesting a Writ of Certiorari.

General Grounds.

Your petitioner would call attention to the essential identity of this case with the case of Whitman *v.* National Bank of Oxford, 176 U.S. 559. Both are cases by judgment creditors of Kansas corporations to enforce against individual stockholders the liability imposed by paragraph 1192 of the General Statutes of Kansas of 1889. In that case there was involved about $4,200; in this case there is involved, including interest, over $6,200. In that case the Kansas corporation was held liable upon two notes made payable to the order of "J. L. Huey, Cash.," and bearing a written guaranty of payment (with no other endorsement) signed "Arkansas City Investment Co., Arkansas City, Kansas. J. L. Huey, Cash."; in this case the Trust Company was held liable upon three notes made payable to Ethell, endorsed by him "without recourse," and at the same time guaranteed by the Trust Company for a valuable consideration. That case was certified to this Court after judgment

for the creditor, at a time when every federal court which had passed upon the question (in eight decisions) had held without exception that the creditor could recover in such an action. This is the first reported case in any federal court which has held that under such circumstances the creditor could not recover. In that case this Court affirmed the judgment of the Court of Appeals for the Second Circuit in favor of the creditor; in this case the Court of Appeals for the First Circuit has refused to follow that decision of this Court and has found for the stockholder. This is certainly a case of greater novelty than the case of Whitman *v.* Bank of Oxford, and involves principles equally as important.

Special Grounds.

The special grounds upon which your petitioner asks for this writ are three: —

1. Because this is a case of peculiar gravity and of general importance for the reason that the United States Circuit Court of Appeals for the First Circuit has absolutely declined to adopt and follow rulings of law established by this Court in each instance by repeated decisions upon eight specific points which will be set out and discussed separately hereafter.

2. Because the United States Circuit Court of Appeals for the First Circuit rested its decision against your petitioner upon the sole ground that the guaranties of the Trust Company, upon which his judgment against that company was recovered, were *ultra vires*, whereas there is no evidence in the case tending to show that those guaranties were *ultra vires*. That Court declined to inspect the record upon this question, although it was duly presented in the petitioner's first and fourth assignments of error.

3. Because the facts specially found by the Circuit Court were not sufficient to support a judgment for the respondent, but required a judgment for the petitioner, in accordance with the repeated decisions of this Court and of the Supreme Court of Kansas, that a judgment against a corporation is conclusive on the stockholder in the absence of fraud and collusion.

Points and Authorities.

Ground I.

The Court of Appeals declined to adopt and follow rulings of law established by this Court upon the following points, which were material to the decision.

1.

Exceptions to the rulings of the Court, where jury trial is waived, upon propositions of law duly presented to the Court and considered before the finding, are properly presented to the Circuit Court of Appeals in a bill of exceptions duly allowed by the Circuit Court.

The petitioner asked the Circuit Court for a declaration of law upon the propositions set out in the bill of exceptions, and took exceptions to the refusal of the Court to give the five rulings requested (Assignments of Error 1, 2, 3, 4, 5; Record, pp. 16, 17). These exceptions were allowed, and are not disposed of by the finding of facts.

Norris *v.* Jackson, 9 Wall. 125, 128.
Ins. Co. *v.* Sea, 21 Wall. 158, 160.
Lehnen *v.* Dickson, 148 U.S. 71, 73.
Mercantile Trust Co. *v.* Wood, 60 Fed. Rep. 346, 348; 8 C. C. A. 658.
Clement *v.* Phenix Ins. Co., 7 Blatchf. 51, 53.

The refusal of the Circuit Court to adopt these propositions in the decision of this case gives the petitioner a right of exception. These exceptions should have been passed on by the Court of Appeals.

2.

The refusal of the Circuit Court to rule that upon all the evidence in the case the plaintiff is entitled to recover as a matter of law, when application for such ruling is made before the finding of the Court, raises a question of law, which, if

exception is taken and preserved in a bill of exceptions, presents a question of law for the decision of the Circuit Court of Appeals.

The petitioner's first assignment of error, upon an exception to the refusal of the Circuit Court to rule that upon all the evidence in the case the petitioner was entitled to recover as a matter of law, raises this question.

St. Louis *v.* W. U. Tel. Co., 148 U.S. 92, 96.
Lehnen *v.* Dickson, 148 U.S. 71, 73.
Ins. Co. *v.* Folsom, 18 Wall. 237, 251.
World's Col. Exp. *v.* France, 96 Fed. Rep. 687, 689; 38 C. C. A. 483.

Any other ruling than that laid down in the above cases would be intolerably oppressive. The Circuit Court found as a fact that the respondent was liable as a stockholder. Unless the respondent has shown that the company's guaranties were *ultra vires* his case must fall to the ground. There is no evidence of it.

3.

A "judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it."

Mr. Justice Field in Davis *v.* Brown, 94 U.S. 423, 428.
Cromwell *v.* Co. of Sac, *Ibid.*, 351, 352.
Keokuk Railroad *v.* Missouri, 152 U.S. 301, 315, and cases cited.
Comstock *v.* Crawford, 3 Wall. 396, 406.
Grignon *v.* Astor, 2 How. 319, 340.

"What is implied in a record, pleading, will, deed, or contract is as effectual as what is expressed."

Mr. Justice Swayne in Cornett *v.* Williams, 20 Wall. 226, 250, 251.
U.S. *v.* Babbitt, 1 Black, 51, 61.

The conclusiveness of a judgment does not depend upon the reasons for the judgment, but upon the fact of a judgment.

So. Pac. R.R. *v.* U.S., 168 U.S. 1, 48–52, and cases cited.
Citizens' Bank *v.* Brigham, 61 Kans. 727.

A judgment by default is just as conclusive as one rendered after answer and contest.

Last Chance Mining Co. *v.* Tyler Min. Co., 157 U.S. 683, 691.

A judgment against a corporation is conclusive, although based upon a claim which was absolutely *ultra vires*.

Franklin Co. *v.* German Bank, 142 U.S. 93.
U.S. *v.* New Orleans, 98 U.S. 381, 395, 397.
Wilson's Executor *v.* Deen, 121 U.S. 525, 534.
Board of Com'rs *v.* Platt, 79 Fed. Rep. 567, 572; 25 C. C. A. 87, 91.
Ætna Ins. Co. *v.* Lyon Co., 44 Fed. Rep. 329, 344.
U.S. *v.* Board of Auditors, 28 Fed. Rep. 407.

A judgment is binding although the claim was barred by a discharge in bankruptcy which was not pleaded.

Dimock *v.* Revere Copper Co., 117 U.S. 559.

If the pleadings show that the cause of action was barred by the statute of limitations, a stockholder cannot set that up when sued on the judgment.

Schnack *v.* Boyd, 59 Kans. 275, 278.
Head *v.* Daniels, 38 Kans. 1, 5.

So also if usury might have been pleaded as a good defence but was not.

Charles *v.* Davis, 62 N.H. 375.

A foreclosure decree is binding upon parties and privies as to defences not set up.

Stout *v.* Lye, 103 U.S. 66.

It was alleged in the petitioner's declaration against the Trust Company that said "Trust Company, for value and in writing guaranteed the payment" of the notes (Record, p. 80). The making of the guaranties was an essential to the plaintiff's recovery of judgment. That judgment is certainly conclusive on the Trust Company.

4.

A stockholder "is so far an integral part of the corporation, that, in the view of the law, he is privy to the proceedings touching the body of which he is a member," and a judgment against a corporation is binding on its stockholders in the absence of fraud and collusion.

This is the law of this Court.

Hawkins *v.* Glenn, 131 U.S. 319, 329, and cases cited.
Hancock Bank *v.* Farnum, 176 U.S. 640, and cases cited.
Graham *v.* Railroad, 118 U.S. 161, 179.

It is the law of Kansas.

Ball *v.* Reese, 58 Kans. 614.
Steffins *v.* Gurney, 61 Kans. 292, 294, 295.
Thompson *v.* Pfeiffer, 60 Kans. 409, 420.

It is the law almost universally, and has hitherto been the law of the First Circuit.

Hale *v.* Hardon, 95 Fed. Rep. 747, 757, 758, and cases cited; 37 C. C. A. 240.
Dexter *v.* Edmands, 89 Fed. Rep. 467.

It is immaterial that the judgment was rendered by default.

Steffins *v.* Gurney, 61 Kans. 292, 295.
Guerney *v.* Moore, 131 Mo. 650, 667.
Hale *v.* Hardon, 95 Fed. Rep. p. 760.
Holyoke Bank *v.* Goodman Co., 9 Cush. 576, 584.
Gaskill *v.* Dudley, 6 Met. 546.
Milliken *v.* Whitehouse, 49 Maine, 527, 529.
Came *v.* Brigham, 39 Maine, 35.
Hanson *v.* Davison, 73 Minn. 454.
Wilson *v.* Stockholders, 43 Pa. St. 424.

This rule has no application to the case of fraudulent conveyances (Record, p. 112). The grantee of a fraudulent conveyance is allowed to dispute a judgment against his grantor in favor of a creditor who seeks to set aside the conveyance for the very reason that the grantee is not a party or privy to that judgment.

"The tenant was not a party or privy to that suit, and is not concluded by the judgment."

Endicott, J., in Tarbell *v.* Jewett, 129 Mass. 457, 459.

Clearly, if the corporation is estopped by this judgment, the stockholder is also estopped because he is in privity with the corporation.

"'Hence, all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive on him

with whom they are in privity.' The correctness of this statement has been often affirmed by this Court: Lovejoy *v.* Murray, 3 Wall. 1, 19; Robbins *v.* Chicago City, 4 Wall. 657, 673; and the principle has been recognized in many cases. Indeed it is elementary."

Chief Justice Waite in Litchfield *v.* Goodnow, 123 U.S. 549, 551.

No fraud or collusion is claimed in this case. If the respondent had apprehended any fraud, collusion, or dereliction of duty in the officers of the Trust Company, knowing as he did that the corporation was in financial straits and had not declared a dividend for two and a half years prior to the petitioner's suit against the company, he had the right to intervene and defend in that suit.

Fitzwater *v.* National Bank, 61 Pac. Rep. 684 (Kans.). Mining Co. *v.* McKibben, 60 Kans. 387.

The Circuit Court found that these guaranties were "given upon a valuable consideration" (Record, p. 7). It is clear that the petitioner could recover back that consideration, either directly on the theory of estoppel, or by an action of *quantum meruit*.

Central Trans. Co. *v.* Pullman Co., 139 U.S. 24, 57–61; 171 U.S. 138, 150, 151.

The following paragraphs of the compiled laws of Kansas of 1885 show what the petitioner's rights were in the courts of Kansas with reference to his claim: —

"(3803) Section 10. The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing are abolished; and in their place there shall be, hereafter, but one form of action, which shall be called a civil action."

"(3886) Section 87. The petition must contain;
"*Second.* A statement of the facts constituting the cause of action, in ordinary and concise language and without repetition."

"(3938) Section 139. The Court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party, or correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or conform the pleading or proceeding to the facts proved, when such amendment does not change substantially the claim or defence; and when any proceeding fails to conform, in any respect, to the provisions of this code, the Court may permit the same to be made conformable thereto by amendment."

The corresponding paragraphs in the General Statutes of Kansas of 1889 are respectively paragraphs 4087, 4170, and 4222.

If the Trust Company had answered to the petitioner's suit and claimed that the guaranties were *ultra vires*, the petitioner might then have set out any facts necessary to permit him to recover substantially for a *quantum meruit*. It must be presumed that the consideration paid the Trust Company for its guaranties was the amount which the petitioner recovered in his judgment against that company. The Trust Company and its stockholders have had the benefit of that money. There is certainly no equity in favor of the respondent stockholder which should permit him to impeach that judgment.

5.

"The power which can give authority to act can ratify any act that is taken, and generally legislative recognition of an act or a corporation validates the act or the corporation, although neither one nor the other may have had full prior legal authority."

Mr. Justice Brewer in Street *v.* U.S., 133 U.S. 299, 307.
Comanche County *v.* Lewis, *Ibid.* 198, 202.
City Railway Co. *v.* Citizens Co., 166 U.S. 557, 569.

"It is a general principle of almost universal application, that whenever a state, county, corporation, partnership, or person has power originally to do a particular act, it also has the power to ratify and make valid an attempted effort to do such act, although the same may have been done ever so defectively, informally, or even fraudulently in the first instance."

Valentine, J., in State *v.* Com'rs of Pawnee Co., 12 Kans. 426, 439.
State *v.* Stevens, 21 Kans. 210, 215.
State *v.* Hamilton, 40 Kans. 323, 333.

Chapter 23, Article 3, Section 15, of the Compiled Laws of Kansas of 1885 is as follows: —

"Section 15. Corporations shall have power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, and may execute bonds or promissory notes therefor, and may pledge the property and income of the corporation."

This was amended by Chapter 109, Section 1, of the laws of Kansas for 1889 by adding thereto the following: —

"Provided, however, that the provisions of this section shall not apply to the debentures or bonds of any loan or trust company, duly incorporated under the provisions of this chapter, the payment of which debentures or bonds shall be secured by a transfer of real estate or by other securities for the benefit and protection of purchasers of said debentures or bonds; such collateral to be at least equal in amount to the par value of such bonds or debentures, and all real estate mortgage securities to be first liens on the property on which loans are made."

This act recognizes and ratifies the right of loan and trust companies to issue debenture bonds secured by first mortgages on real estate. A debenture bond is practically "a note of a corporation secured by the securities as collateral; in other words, it is a note secured by the pledge of securities."

Cook on Corporations, 4th ed., vol. 2, sect. 776, p. 1777.

"The name is not of the slightest consequence."

Schofield, J., in Ward *v.* Johnson, 95 Ill. 215, 239.

There is no real distinction between such debenture bonds and the guaranties of the Trust Company in this case. The guaranties are obligations in the name of the Trust Company secured by a real estate mortgage and also by the signatures of the makers of the notes. The guaranties were made on May 9, 1889 (Record, p. 87), and were therefore fully authorized by the act which took effect on March 14, 1889. The charter of the Trust Company is broad enough to cover such choses in action as these guaranties secured by real estate.

Parkinson *v.* Bank, 60 Kans. 474, 477.
McCormick *v.* Market Bank, 165 U.S. 538, 550.

6.

"When a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contrary, be presumed to be valid."

Mr. Justice Swayne in Railroad *v.* McCarthy, 96 U.S. 258, 267.
Lexington *v.* Butler, 14 Wall. 282, 296.
Louisville R.R. *v.* Louisville Trust Co., 174 U.S. 552, 573.
Fuller *v.* Scott, 8 Kans. 25.
Waynick *v.* Richmond, 11 Kans. 488.
Bissell *v.* Railroad, 22 N.Y. 258, 290.
Monument Bank *v.* Globe Works, 101 Mass. 57.
Manufacturing Co. *v.* Canney, 54 N.H. 295, 324–327.
Chautauqua Bank *v.* Risley, 19 N.Y. 369, 381, 382.
Farmers Loan Co. *v.* Curtis, 7 N.Y. 466, 470, 471.
Alward *v.* Holmes, 10 Abbott, N.C. 96, 99, 102.
Roussin *v.* St. Louis Ins. Co., 15 Mo. 244, 248.

Hart *v.* Ins. Co., 21 Mo. 91, 93.
McIntire *v.* Preston, 10 Ill. 48, 62.
Union Water Co. *v.* Fluming Co., 22 Calif. 620, 628, 629.

The judgment record shows that the notes were negotiated by Ethell (pp. 79–87). It does not show that Ethell did not negotiate them for the benefit of the Trust Company.

It is not *ultra vires* for a banking institution to put assets into the name of an individual as trustee.

Schofield *v.* State Bank, 97 Fed. Rep. 282; 38 C. C. A. 179.

It is conceded to be the general rule that "banking institutions may guarantee paper owned by them when they negotiate it" (Record, p. 110). The reason of the rule applies with equal force when the obligation is in the name of an individual but in trust for and for the benefit of the company. If negotiated by a trustee for the benefit of the company it may be guaranteed by the company upon negotiation.

Talman *v.* Rochester Bank, 18 Barb. (N.Y.) 123.
Lyon *v.* First National Bank, 85 Fed. Rep. 120, 122; 29 C. C. A. 45, 47, 48.
Opdyke *v.* Railroad, 3 Dillon, 55, 72, 73.
Marbury *v.* Kentucky Land Co., 62 Fed. Rep. 335, 347, 350; 10 C. C. A. 393, 406.
Baxter *v.* Washburn, 8 Lea (Tenn.) 1, 15, 16.
Rogers Works *v.* Southern Association, 34 Fed. Rep. 278, 281.
New York Trust Co. *v.* Lombard Investment Co., 73 Fed. Rep. 537, 549.
See also Railroad *v.* Howard, 7 Wall. 392, 412.
Green Bay R.R. *v.* Steamboat Co., 107 U.S. 98.
National Bank *v.* Mathews, 98 U.S. 621, 626.
National Bank *v.* Whitney, 103 U.S. 99, 101.
Fort Worth Co. *v.* Smith Bridge Co., 151 U.S. 294, 301.

It necessarily follows from the above cases that evidence to show all the circumstances might have been given to rebut the claim of *ultra vires*.

See also Ford *v.* Williams, 21 How. 287.
Steam Navigation Co. *v.* Bank, 6 How. 344, 380, 381.
Baldwin *v.* Bank, 1 Wall. 234, 240, 241.
Jones *v.* Guaranty Co., 101 U.S. 622, 631.
Calif. Ins. Co. *v.* Union Co., 133 U.S. 387, 409.
Holmes *v.* Goldsmith, 147 U.S. 150, 160.
Scantlin *v.* Allison, 12 Kans. 85.

It was not necessary to do this, however, as the contract is presumed to be valid and there is no evidence to the contrary.

7.

A holder of negotiable paper for value and before maturity is presumed to be a *bona fide* holder.

Lexington *v.* Butler, 14 Wall. 282.
Carpenter *v.* Longan, 16 Wall. 271.
Chambers Co. *v.* Clews, 21 Wall. 317, 323.
San Antonio *v.* Mehaffy, 96 U.S. 312.
Louisville R.R. *v.* Louisville Trust Co., 174 U.S. 552, 575.

The record shows that the petitioner is a holder for value and before maturity (Record, p. 80), and in the absence of evidence affecting the validity of the guaranties he is presumed to be a *bona fide* holder. The Court of Appeals in the decision (p. 112) denies this and says: "But, on the pleadings in the original suit in the case at bar, the present plaintiff had notice, because the guaranties of the corporation were a part of the transaction of his obtaining the notes."

This reasoning assumes that the judgment is not conclusive either against the respondent or the Trust Company. It assumes further that there could be no possible circumstances whereby the guaranties could be valid, such, for instance, as the interpretation by the courts of Kansas that the act of March 14, 1889, applied to this case and authorized the guaranties; or that Ethell might have negotiated the notes only as trustee for the Trust Company and for its benefit, and that the guaranties in that case would be valid; or that the guaranties came within the charter powers of the Trust Company "to buy and sell personal property," and "choses in action of every kind and description"; or that the court of Kansas would not hold such guaranties invalid under any circumstances. The Court of Appeals should have made all these presumptions in favor of the petitioner, but in the decision it made every presumption against him.

8.

"Acts done by the corporation which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter."

Mr. Justice Story in Bank *v.* Dandridge, 12 Wheat. 64, 70.

Approved and applied as a general rule in the following cases: —

Broome *v.* U.S., 15 How. 143, 155.
Supervisors *v.* Schenck, 5 Wall. 772, 782.
Davis *v.* Gray, 16 Wall. 203, 217.
McNitt *v.* Turner, *Ibid.*, 352, 363, 364.
Carpenter *v.* Rannels, 19 Wall. 138, 146.
Cornett *v.* Williams, 20 Wall. 226, 249, 250.
Keely *v.* Sanders, 99 U.S. 441, 447.
Railroad *v.* Keokuk Company, 131 U.S. 371, 381.
Knox County *v.* National Bank, 147 U.S. 91, 97.
City Railroad *v.* Citizens Railroad, 166 U.S. 557, 569.

It was not necessary for the petitioner to offer evidence additional to the record of his judgment against the Trust Company in order to show that he had valid claims against that company on its guaranties. If, in order to sustain the legality of those guaranties, other facts must exist, such as the fact that Ethell negotiated the notes guaranteed only as trustee for and for the benefit of the Trust Company, then those facts are presumptively proved by the act of the Trust Company in making the guaranties. It is presumed that the company acted lawfully and not *ultra vires*.

SUMMARY OF GROUND I.

The petitioner claims that his judgment against the Trust Company is conclusive proof that the guaranties of that company were valid; that it is conclusive against the respondent, who is a stockholder and in privity with the company, because there is no evidence of fraud or collusion in procuring the judgment, and because the Circuit Court found as a fact that the guaranties were "given upon a valuable consideration," and the respondent shows no equity which can permit him to impeach that judgment; that the guaranties were authorized by chapter 109 of the laws of Kansas of 1889, and were recognized as valid by the Legislature of Kansas in that act; that on the face of the record the guaranties do not appear to be necessarily beyond the scope of the power of the corporation; that the petitioner is a *bona fide* holder of the guaranties; and that the act of the Trust Company in making the guaranties is presumptive proof of any facts necessary to make them legally operative.

These presumptions depend upon rules of law repeatedly laid down by this Court. Those rules of law were called to the attention of the Circuit Court and Circuit Court of Appeals, but were not adopted by those courts. The Court of Appeals, on the contrary, ruled as follows (Record, p. 114):—

"In this connection, it should be observed that the plaintiff refers to certain cases by virtue of which he maintains that there is a presumption that the guaranties were within the powers of the corporation, and of its officers who executed them. These, however, only sustain the rule stated in Express Com-

pany *v.* Railroad Company, 99 U.S. 191, 199, and concern merely the question of presumption, and the necessity of offering proof before a defence is made. They have no relation to a conclusive presumption, nor any pertinency when the true facts of the case are reached, as they are at bar."

But there is no evidence in this case concerning these facts except the record evidence of the petitioner's judgment (pp. 79–101), the charter of the company (p. 38), and the directors' vote (p. 55). The Court of Appeals reaches its conclusion, therefore, by declining to investigate the record, as required by the petitioner's first and fourth requests for rulings, to see whether the findings are supported by any evidence. As there is no such evidence, the presumptions invoked by the petitioner have full force, and he is entitled to judgment.

It would be an intolerable injustice for any suitor in any court to be deprived of a judgment to which he is entitled by a finding of fact which has no legal evidence whatever to support it. Your petitioner comes to this Court because he has challenged the sufficiency of the evidence, as a matter of law, in the Circuit Court and Court of Appeals, relying on the decisions of this Court that such a question is a matter of law. No stronger appeal can be made to this Court for the writ of *certiorari* than the allegation that the Circuit Court and Circuit Court of Appeals have declined to adopt and apply principles of law established by this Court. This Court has recognized that conflicting decisions of the inferior courts constitute a sufficient ground for issuing this writ. It is of far greater importance that the decisions of inferior tribunals shall not conflict with the established rules of decision in this Court. Such a conflict is destructive of all judicial authority.

Forsyth *v.* Hammond, 166 U.S. 506, 515.

Ground II.

Because the Court of Appeals rested its decision against your petitioner upon the sole ground that the guaranties of the Trust Company, upon which his judgment against that company was

recovered, were *ultra vires*, whereas there is no evidence in the case tending to show that those guaranties were *ultra vires*.

The evidence in the case consists of the deposition of the respondent and his grandson (Record, pp. 64–78), which relates entirely to proof that the respondent is a stockholder in the Trust Company; the deposition of James A. Troutman (pp. 40–63), which relates chiefly to the same issue but also identifies the records of the Trust Company; and the record evidence, which consists of the charter (p. 38), by-laws (pp. 50–53), and minutes (pp. 53–60) of the Trust Company, and the petitioner's judgment and execution against that company (pp. 79–101). There is not a scintilla of evidence tending to show that the company's guaranties were *ultra vires* in any of the depositions nor in the record evidence, except what may be argued from the judgment record. That is no evidence of *ultra vires*.

The petitioner claims that the presumptions established by this Court as already argued preclude the respondent from taking advantage of his plea of *ultra vires*. The propositions argued under points 5, 6, 7, and 8 of Ground I. conclusively establish that the guaranties of the Trust Company must be presumed to be valid in the utter absence of evidence to the contrary. The propositions argued under points 3 and 4 of Ground I. conclusively establish that the petitioner's judgment upon those guaranties is final both against the Trust Company and the respondent. The petitioner's suit is based upon a judgment and execution against the Trust Company which are expressly declared to be valid, and is to enforce a liability against the respondent, who is expressly declared to be a stockholder, and no evidence is offered to impeach that judgment. A judgment conclusively establishing that the petitioner's claim is valid against the Trust Company is not evidence that his claim is *ultra vires*. A judgment does not impeach itself.

Your petitioner has faithfully followed the precedents established by this Court, and has preserved his rights in exact conformity with those precedents. He presented his requests for rulings to the Circuit Court at the argument and before the finding, to the effect that he was entitled to recover as a matter of law upon all the evidence, and that the guaranties were not

ultra vires. Those rulings were not given, and he excepted, and his exceptions were allowed (Record, pp. 11, 12, and Assignments of Error, 1 and 4). Upon the authorities already cited under points 1 and 2 of Ground I. it is clear that the petitioner's rights are preserved by his exceptions.

Not only is the judgment record no evidence of *ultra vires*, but on the face of the record it appears affirmatively that the guaranties were negotiated by Ethell entirely for the benefit of the Trust Company; that record shows that the notes in question were endorsed by Ethell "without recourse" (Record, p. 87); "that at the time of the endorsement of said notes to this plaintiff" the Trust Company guaranteed the payment of them for value (p. 80); that they were payable at the office of the Trust Company (p. 86); that the mortgage deed given to secure the notes ran to a trustee for the benefit of the Trust Company (pp. 88–90); and that the Trust Company had the exclusive right to declare the notes due upon any default, to demand the foreclosure of the mortgage, and to receive the proceeds of the mortgage to protect it on its guaranties (p. 90).

This Court has held that there is no inference that an endorsement "without recourse" is for value paid to the endorser.

"Nor under this endorsement, which is an assignment of the note without expressing value received, and that, too, without recourse against the assignor, can it be fairly inferred that the nominal value of the note was actually paid."

> Chief Justice Marshall in Welch *v.* Lindo, 7 Cranch, 159, 163.
> See Robinson *v.* Lincoln, 5 Met. (Mass.) 201, 204.

The guaranties are expressed to be for a valuable consideration. It is a fair inference from the foregoing facts that the value was paid to the Trust Company at the time these notes were negotiated and guaranteed, and that the Trust Company was the party beneficially interested in the transaction. The vote of the directors (Record, p. 55) authorized the guaranty

of "securities negotiated by the company." The presumption must be that these securities were really negotiated by the company, in the absence of evidence to the contrary. They are endorsed "Negotiated by The Western Investment Loan and Trust Company, Topeka, Kansas" (p. 87).

The notes and mortgage deed are to be construed together.

Moline Plow Co. *v.* Webb, 141 U.S. 616, 625.

The Trust Company seems to have followed the usual course of business in Kansas.

Crissey *v.* Loan Co., 59 Kans. 561, 562.
See Van Pelt *v.* Strickland, 60 Kans. 584.

In addition to the statutes already cited, the petitioner would call attention to the following paragraphs of the Compiled Laws of Kansas of 1885: —

"(1136) Section 11. Every corporation, as such, has power:
"*Sixth.* To make by-laws, not inconsistent with existing laws, for the management of its property, the regulation of its affairs, and for the transfer of its stock.
"*Seventh.* To enter into any obligation or contract essential to the transaction of its ordinary affairs."

The following decisions of the Supreme Court of Kansas seem to sustain the petitioner's position: —

Commercial Bank *v.* Provident Institution, 59 Kans. 361, 365, and cases cited.
Railroad *v.* Johnson, 58 Kans. 175.
Railroad *v.* Fletcher, 35 Kans. 236, 250.

The case of Commercial Bank *v.* Provident Institution, in particular, seems to imply that if the guaranty is made in the interest of the bank it would not be *ultra vires*, and, in any

event, that every presumption should be made in its favor. It is difficult to follow the reasoning of the Court of Appeals construing that decision into an authority against the petitioner (Record, pp. 109, 110).

The Court of Appeals did not give full faith and credit to the petitioner's judgment (13th Assignment of Error, Record, p. 19).

Hancock Bank *v.* Farnum, 176 U.S. 640.

That case had not been decided when this case was decided in the Circuit Court.

Upon the facts stated in paragraph 7 of the petition for this writ it is clear that the Circuit Court was bound to find that the transfer by the respondent to his grandson was colorable. Indeed, this is not disputed.

Van Demark *v.* Barons, 52 Kans. 779, 782.
Johnston *v.* Laflin, 5 Dillon, 65. Affirmed in 103 U.S. 800.
National Bank *v.* Case, 99 U.S. 628.
Bowden *v.* Jones, 107 U.S. 251.
Pauly *v.* Trust Co., 165 U.S. 606, 619.
Stuart *v.* Hayden, 169 U.S. 1, 9.
Foster *v.* Lincoln, 79 Fed. Rep. 170; 24 C. C. A. 470.
Cox *v.* Montague, 78 Fed. Rep. 845; 24 C. C. A. 364.
Houghton *v.* Hubbell, 91 Fed. Rep. 453; 33 C. C. A. 574.
Cory *v.* Morrill, 71 Vt. 51, 57.
Rider *v.* Fritchey, 49 Oh. St. 285.
Pinkerton *v.* Railroad, 42 N.H. 424.
Coolidge *v.* Melvin, 42 N.H. 510, 518–522, 530–534.
Gove *v.* Campbell, 62 N.H. 401.

The third assignment of error is an exception to the refusal of the Circuit Court to rule that the judgment and execution against the Trust Company, in evidence, are included in the word "dues" in Article XII., Section 2, of the Constitution of

Kansas, and constitute such a "due" as is secured by the individual liability of stockholders in corporations organized under the laws of Kansas.

It is conceded that the word "dues" includes all contractual obligations (Record, p. 111). This is in accordance with all the authorities.

Whitman *v.* Bank of Oxford, 176 U.S. 559, 563.
Chase *v.* Curtis, 113 U.S. 452, 463.
Rider *v.* Fritchey, 49 Oh. St. 285, 295.
Herrick *v.* Wardwell, 58 Oh. St. 294, 309.
Flenniken *v.* Marshall, 43 So. Carolina, 80, 85.
See also Grund *v.* Tucker, 5 Kans. 70, 77.
Haynes *v.* Brown, 36 N.H. 545, 566.
Smith *v.* Omans, 17 Wisc. 395, 396.
Powell *v.* Oregonian Co., 36 Fed. Rep. 726; 38 Fed. Rep. 187.

It is clear that the guaranties which were the petitioner's original claim against the Trust Company are contractual obligations. Unless the respondent has proved that they are *ultra vires*, and unless he can go behind the petitioner's judgment and assert that as a defence, the petitioner clearly is entitled to recover. The respondent never pleaded *ultra vires* as a defence to the petitioner's first count (Record, p. 37), which is all that is relied on.

The second assignment of error is an exception to the refusal of the Circuit Court to rule that the execution in evidence in this case is an execution against the effects of a corporation within the meaning of paragraph 1192 of the General Statutes of Kansas, 1889.

This raises a question which is not limited to the interpretation of the word "dues" in the constitution of Kansas. The constitutional provision, Article XII., Section 2, is mandatory, or at least directory, on the Legislature of Kansas; but it is not a limitation on the power of the Legislature to impose any liability it sees fit upon stockholders in corporations other than railways or religious or charitable corporations.

"The Constitution contains no grant of powers to the Legislature. It is only a limitation on the exercise of its authority; and the Legislature, in its discretion, has the right to pass any act not violative of the state or federal constitutions."

Horton, C. J., in Castle *v.* Houston, 19 Kans. 417, 427.
Leavenworth Co. *v.* Miller, 7 Kans. 479.
Cooper *v.* Telfair, 4 Dallas, 14.
Fletcher *v.* Peck, 6 Cranch, 87, 135, 136.
Bolles *v.* Brimfield, 120 U.S. 759, 761.
Cooley on Constitutional Limitations, 6th ed., pp. 104–106, and cases cited.

If the word "dues" is construed to mean only a certain class of debts, the constitution does not prohibit the Legislature from enacting such laws as it sees fit, to secure all kinds of liabilities from corporations, by making their stockholders liable. It is submitted that this is what the Legislature of Kansas has done in enacting paragraph 1192.

No evidence appears of any circumstances that constitute a defence to the petitioner's case upon the conceded facts.

Ground III.

Because the facts specially found by the Circuit Court were not sufficient to support a judgment for the respondent, but required a judgment for the petitioner. Assignments of error 5, 14, and 15 are applicable to this question.

The errors specified in assignments 14 and 15 would be available to the plaintiff in error though he had filed no bill of exceptions.

Allen *v.* St. Louis Bank, 120 U.S. 20, 30.
Ins. Co. *v.* Boon, 95 U.S. 117, 124.
Tyng *v.* Grinnell, 92 U.S. 467, 469.

The material facts specially found are these (Record, p. 7): The respondent is liable as the owner of one hundred shares of the par value of fifty dollars each in the Trust Company, a corporation organized under the general laws of Kansas, which is not a railway or a charitable or religious corporation. The petitioner in March, 1893, recovered a valid judgment against that company on the guaranty of certain notes for $9,787.50, bearing interest at 12 per cent. On December 11, 1893, $4,924.75 was paid thereon; and on September 15, 1896, execution was issued for the balance and was returned wholly unsatisfied.

Those are all the material facts in the case, and upon those facts the petitioner is entitled to judgment. This Court and the Supreme Court of Kansas have both held that such a judgment and execution are conclusive on the stockholders of the corporation except when obtained by fraud or collusion.

Hancock National Bank *v.* Farnum, 176 U.S. 640.
Ball *v.* Reese, 58 Kans. 614.
Steffins *v.* Gurney, 61 Kans. 292.
Also cases cited under points 3 and 4 of Ground I.

No other exceptions are recognized by the courts of Kansas. "The nature of the liability and the time and the mode of its enforcement are to be determined from the statutes, and not by the notions which particular courts might entertain as to what would be equitable and just in such cases. The provisions of the statute in question, which fix the liability of the stockholder, are plain and leave little room for interpretation."

Johnston, J., in Sleeper *v.* Norris, 59 Kans. 555, 558.

A judgment on an *ultra vires* claim is just as conclusive as a judgment on any other claim.

Franklin Co. *v.* German Bank, 142 U.S. 93.
U.S. *v.* New Orleans, 98 U.S. 381, 395, 397.
Board of Com'rs *v.* Platt, 79 Fed. Rep. 567, 572;
25 C. C. A. 87, 91.

The Supreme Court of Kansas has construed the constitutional and statutory provisions which create this liability, and that construction is binding on all other courts. Inasmuch as the decision of the Court of Appeals is in conflict with that construction, this is pre-eminently a case which should be certified to this Court for correction.

Forsyth *v.* Hammond, 166 U.S. 506, 515.

It is immaterial in this action whether the securities guaranteed were negotiated by the corporation or not. The finding that the guaranties sued on were not within the scope of the director's resolution (Record, p. 8) is immaterial after judgment on the guaranties. But comparing the guaranty (Record, p. 87) with the resolution (p. 55) shows that Form 2 authorizes payment "within days after maturity," while the guaranties on the notes guarantee payment "at maturity." Form 2 would authorize a guaranty of payment one day after maturity, while the actual obligation authorizes payment one day earlier than that. Surely that is substantial agreement with the authority voted. There is a presumption that the guaranty was within the powers of the corporation and its officers.

Bank *v.* Atkinson, 8 Kans. App. 30, 33.
Town Company *v.* Swigart, 43 Kans. 292.
Express Company *v.* Railroad, 99 U.S. 191, 199.

It is immaterial what the respondent may have known about the business of the company with reference to these guaranties. The corporation received full value for its guaranties to the petitioner, according to the facts found (Record, p. 7). The petitioner therefore had a valid judgment against the corporation which was contractual in its nature. To a judgment on such a claim the respondent has no defence, whether he was cognizant of the transaction or not. The contractual relation between the respondent stockholder and the petitioner creditor of the

corporation is implied by law, and is not a question of fact in any sense (see Record, p. 8).

Railroad *v.* Gebhard, 109 U.S. 527, 537, 538.
Howarth *v.* Lombard, 175 Mass. 570, 574–576, and cases cited.

Upon the facts found, then, the general finding for the defendant was error. The special finding covers all the issues raised by the pleadings, and this Court should direct such judgment to be entered as the special finding requires.

Allen *v.* St. Louis Bank, 120 U.S. 20, 40.
Fort Scott *v.* Hickman, 112 U.S. 150, 165, and cases cited.
Evans *v.* Kister, 92 Fed. Rep. 828, 833; 35 C. C. A. 28, 33.

Inasmuch as it expressly appears upon the face of the record that the petitioner is entitled to judgment, this Court ought to issue the writ of *certiorari* prayed for and bring the record of this case before the Court that judgment may be ordered for the petitioner as law and justice require.

WILLIAM REED BIGELOW,
E. L. WATERMAN,
PARK B. PULSIFER,
Attorneys for Petitioner.

No. 245.

FILED
MAR 19 1902
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

By W. W. Bigelow for Petitioner

OCTOBER TERM, 1901.

No. 245.

Filed March 19, 1902.

HENRY L. WARD, TREASURER, *Petitioner*,

v.

HIRAM BLAKE AND WALLACE L. MASON,
EXECUTORS OF THE ESTATE OF EDWARD JOSLIN, *Respondents*,

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONER.

WILLIAM REED BIGELOW,
E. L. WATERMAN,
PARK B. PULSIFER,
Attorneys for Petitioner.

BOSTON
NATHAN SAWYER & SON, PRINTERS
DEAN BUILDING, No. 60 INDIA STREET
1902

Supreme Court of the United States.

OCTOBER TERM, 1901. No. 245.

HENRY L. WARD, TREASURER, *Petitioner*,

v.

HIRAM BLAKE AND WALLACE L. MASON,
EXECUTORS OF THE ESTATE OF EDWARD JOSLIN, *Respondents*.

BRIEF FOR PETITIONER.

This case comes before this Court on a writ of *certiorari* to the United States Circuit Court of Appeals for the First Circuit.

Ward, Treasurer, *v.* Joslin, 180 U.S. 639.

STATEMENT OF THE CASE.

THIS is a suit by a judgment creditor of a corporation organized under the laws of Kansas to enforce against a stockholder in that corporation the liability prescribed by Article XII., Section 2, of the Constitution of Kansas, and by paragraph 1192 of the General Statutes of Kansas of 1889.

Article XII., Section 2, of the Constitution of Kansas is as follows: —

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes."

Paragraph 1192 is as follows: —

"If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

The petitioner is a judgment creditor of The Western Investment Loan and Trust Company (hereinafter referred to as the Trust Company), which is not a railway or a religious or charitable corporation, but was organized for the purposes set forth in its charter (Record, p. 28) as follows: "To buy and sell personal property, including stocks, bonds, bills, notes, real and chattel mortgages, and choses in action of every kind and description, and to transact the business of a loan and trust company."

This case was begun on December 15, 1896, by an attachment in an action of debt, and was entered in the Circuit Court of the United States for the District of New Hampshire on May 8, 1897. The petitioner was the original plaintiff. The respondent in his answer set up "that the claim against the Trust Company, upon which a judgment in favor of the plaintiff against said company was founded, was not a due from or debt of said corporation for which the defendant as a stockholder in said corporation was liable under the constitution and laws of Kansas" (Record, p. 27); and also that the Trust Company "never had any authority to endorse the said promissory notes and obligations in the second count in plaintiff's declaration described or to guarantee the payment of said notes and obligations" (p. 27). The petitioner seeks to recover only on the first count of his declaration (Record, pp. 20–22).

The respondent testified that he became the owner in 1888 of one hundred shares of the Trust Company of a par value of fifty dollars each, and transferred them in 1894 to his grandson, without consideration, and under circumstances which showed that the transfer was colorable. The Circuit Court found as a fact "that the transfer was not such a *bona fide* transfer as to relieve the defendant from his individual liability as a stockholder if he were otherwise liable" (Record, p. 6).

The petitioner's judgment against the Trust Company was recovered upon the guaranty of three notes of twenty-five hundred dollars each. These notes were made by S. S. Hite and his wife, dated September 12, 1888, and payable on September 12, 1892, to J. E. Ethell at the office of the Trust Company in Topeka, Kans. (Record, p. 73). They were endorsed to the petitioner by Ethell "without recourse," and at the same time (p. 67) were guaranteed by the Trust Company as follows (p. 74): —

"TOPEKA, KANS., May 9, A.D. 1889.

"For a valuable consideration, The Western Investment Loan and Trust Company hereby guarantees payment of the within obligation, both principal and interest at maturity.

"THE WESTERN INVESTMENT LOAN AND TRUST COMPANY,
"By L. L. TURNER, *President*.

"Attest: SAM'L T. HOWE, *Secretary*.

"Negotiated by The Western Investment Loan and Trust Company, Topeka, Kans."

These three notes were secured by a trust deed from S. S. Hite and wife to one C. F. Jilson as trustee, and the Trust Company as a third party (Record, pp. 74–77). The Trust Company had the exclusive right under this deed to declare the notes due upon any default, to demand the foreclosure of the mortgage by Jilson, and to receive the proceeds of the mortgage to protect it on its guaranties.

The directors of the Trust Company had a meeting on August 7, 1888, and voted that the president and secretary be authorized to guarantee the payment of all securities negotiated by the company in one of three forms (Record, p. 43), the second of which was identical with the guaranty on the above notes, excepting that Form 2 authorized the guaranty of payment "within days after maturity," instead of "at maturity," as appeared on the notes.

Due service of the petitioner's writ was made on the president of the Trust Company (Record, pp. 6, 79), and judgment was recovered by default on March 7, 1893, in the District Court of Smith County in Kansas, for $9,787.50 and interest at 12 per cent. (p. 81). A payment was made on December 11, 1893, of $4,924.75. An execution issued for the balance, and on October 31, 1896, was returned wholly unsatisfied (p. 85). No evidence of *ultra vires* was offered by the respondent, and none appeared except what may be argued from the record of the petitioner's judgment against the Trust Company.

The Circuit Court made a finding of facts (Record, pp. 6, 7), that the petitioner had a valid judgment against the Trust Company with execution thereon returned wholly unsatisfied; that the respondent was a stockholder for five thousand dollars; that the petitioner's judgment was based "upon a guaranty, given upon a valuable consideration, of the payment of certain promissory notes from one third party to another, and was not a guaranty of the payment of securities negotiated by the company"; that this guaranty was not within the scope of the business of the Trust Company; and made a general finding for the respondent.

At the argument and before the findings of the Circuit Court the petitioner presented to the Court in a printed brief five propositions of law and requested the ruling of the Court thereon. The Court considered these propositions but declined to give them, as appears from the declaration of law (Record, pp. 16–18), and the petitioner then excepted to the refusal of the Court to adopt them in this case, and these exceptions were allowed (Record, pp. 8–11).

Assignments of Error.

The assignments of error which are material to this case are as follows (Record, pp. 13–16) : —

1. The Circuit Court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that —

"Upon all the evidence in the case the plaintiff is entitled to recover as a matter of law, and a finding should be made for the plaintiff for the full sum claimed in his declaration."

2. The Circuit Court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that —

"The execution in evidence in this case is an execution against the effects of a corporation within the meaning of paragraph 1192 of the General Statutes of Kansas, 1889."

3. The Circuit Court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that —

"The judgment and execution against The Western Investment Loan and Trust Company in evidence are included in the word 'dues' in Article XII., Section 2, of the Constitution of Kansas, and constitute such a 'due' as is secured by the individual liability of stockholders in corporations organized under the laws of Kansas."

4. The Circuit Court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that —

"The guaranties of said corporation, which are declared on in the plaintiff's second, fourth and sixth causes of action in his suit against said corporation, as appears from the record in evidence, were not *ultra vires* or beyond the power of said corporation to make."

5. The Circuit Court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that—

"If the Court finds that said guaranties of said corporation were *ultra vires* and beyond the power of said corporation to make, that is no defence in this action."

13. The Circuit Court erred in not giving full faith and credit to the plaintiff's judgment and execution against The Western Investment Loan and Trust Company in evidence, as required by Article IV., Section 1, of the Constitution of the United States, and Section 905 of the Revised Statutes of the United States.

14. The Circuit Court erred in ruling that the facts specially found by the Court were sufficient to support a judgment for the defendant.

15. The Circuit Court erred upon the face of the record in entering judgment for the defendant.

Points and Authorities.

The petitioner seeks to recover upon the authority of

Whitman *v.* Oxford National Bank, 176 U.S. 559.
Hancock Bank *v.* Farnum, 176 U.S. 640.

Since this writ of *certiorari* was granted the respondent has died and the executors of his estate have taken upon themselves the defence of this action.

This liability survives against the estate of Edward Joslin.

Whitman *v.* Oxford National Bank, 176 U.S. 559, 567.
Richmond *v.* Irons, 121 U.S. 27, 55, 56.
Fidelity Insurance Co. *v.* Mechanics Bank, 97 Fed. Rep. 297, 300; 38 C. C. A. 193, 196.
Kisseberth *v.* Prescott, 91 Fed. Rep. 611.
Cooper *v.* Ives, 62 Kans. 395.
Plumb *v.* Bank, 48 Kans. 484.
Achenbach *v.* Pomeroy Coal Co., 2 Kans. App. 357.
3 Thompson, Corporations, sections 3320, 3321.
1 Cook, Corporations, 4th ed., section 248.

Public Statutes of New Hampshire, 1891, chap. 191:—

"Section 8. Actions of tort for physical injuries to the person — although inflicted by a person while committing a felony — and the causes of such actions, shall survive to the extent, and subject to the limitations, set forth in the five following sections, and not otherwise."

"Section 14. All other actions and causes of action existing in favor of or against a deceased person, except those for the recovery of penalties and forfeitures of money under penal statutes, shall survive, and may be prosecuted or defended by his administrator."

Tompkins *v.* Blakey, 49 Atlantic Rep. 111 (N.H.).

PETITIONER IS ENTITLED TO RECOVER ON FACTS FOUND.

Assignments of error 14 and 15 directly raise the point that the facts specially found by the Circuit Court are not sufficient to support a judgment for the respondent, but require a judgment for the petitioner. Assignments of error 2, 3, 4, 5, and 13 are also involved and discussed under this head.

The errors specified in assignments 14 and 15 would be available to the plaintiff in error though he had filed no bill of exceptions.

Allen *v.* St. Louis Bank, 120 U.S. 20, 30.
Insurance Co. *v.* Boon, 95 U.S. 117, 124.
Tyng *v.* Grinnell, 92 U.S. 467, 469.

I.

MATERIAL FACTS.

The material facts specially found are these (Record, p. 6): The respondent is liable as the owner of one hundred shares of the par value of fifty dollars each in the Trust Company, a corporation organized under the general laws of Kansas, which is not a railway or a charitable or religious corporation. The

petitioner in March, 1893, recovered a valid judgment against that company on the guaranty of certain notes for $9,787.50, bearing interest at 12 per cent. On December 11, 1893, $4,924.75 was paid thereon; and on September 15, 1896, execution was issued for the balance, and was returned wholly unsatisfied.

This Court and the Supreme Court of Kansas have both held that such a judgment and execution are conclusive on the stockholders of the corporation except when obtained by fraud or collusion.

Hancock National Bank *v.* Farnum, 176 U.S. 640.
Ball *v.* Reese, 58 Kans. 614.
Thompson *v.* Pfeiffer, 60 Kans. 409, 420.
Steffins *v.* Gurney, 61 Kans. 292, 294, 295.

This is the law almost universally, and has hitherto been the law of the First Circuit.

Hale *v.* Hardon, 95 Fed. Rep. 747, 757, 758, and cases cited; 37 C. C. A. 240.
Dexter *v.* Edmands, 89 Fed. Rep. 467.

It is immaterial that the judgment was rendered by default.

Steffins *v.* Gurney, 61 Kans. 292, 295.
Guerney *v.* Moore, 131 Mo. 650, 667.
Hale *v.* Hardon, 95 Fed. Rep., p. 760.
Holyoke Bank *v.* Goodman Co., 9 Cush. 576, 584.
Gaskill *v.* Dudley, 6 Met. 546.
Milliken *v.* Whitehouse, 49 Maine, 527, 529.
Came *v.* Brigham, 39 Maine, 35.
Hanson *v.* Davison, 73 Minn. 454.
Wilson *v.* Stockholders, 43 Pa. St. 424.

This doctrine proceeds upon the theory that "a stockholder is so far an integral part of the corporation, that, in the view of the law, he is privy to the proceedings touching the body of which he is a member."

> Mr. Chief Justice Fuller in Hawkins *v.* Glen, 131 U.S. 319, 329.
> Hancock Bank *v.* Farnum, 176 U.S. 640, 644.

"All privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive on him with whom they are in privity."

> Mr. Chief Justice Waite in Litchfield *v.* Goodnow, 123 U.S. 549, 551, and cases cited.

The above facts specially found are all the material facts in the case, and upon those findings the petitioner is entitled to judgment.

II.

Immaterial Facts.

1.

"Ward's claim against the Trust Company was upon a guarantee, given upon a valuable consideration, of the payment of certain promissory notes from one third party to another, and was not a guarantee of the payment of securities negotiated by the company" (Record, p. 6).

a.

The guaranty by the Trust Company of notes negotiated by a third party would not be necessarily *ultra vires* (Fourth Assignment of Error). The person who negotiated them may have done so as trustee for the company. There is no finding

to the contrary. If negotiated by a trustee for the benefit of the company, they might be guaranteed by the company upon negotiation.

Talman *v.* Rochester Bank, 18 Barb. (N.Y.) 123.
Lyon *v.* First National Bank, 85 Fed. Rep. 120, 122; 29 C. C. A. 45, 47, 48.
Opdyke *v.* Railroad, 3 Dillon, 55, 72, 73.
Marbury *v.* Kentucky Land Co., 62 Fed. Rep. 335, 347, 350; 10 C. C. A. 393, 406.
Baxter *v.* Washburn, 8 Lea (Tenn.) 1, 15, 16.
Rogers Works *v.* Southern Assoc., 34 Fed. Rep. 278, 281.
New York Trust Co. *v.* Lombard Inv. Co., 73 Fed. Rep. 537, 549.

See also—

Railroad *v.* Howard, 7 Wall. 392, 412.
Green Bay Railroad *v.* Steamboat Co., 107 U.S. 98.
National Bank *v.* Mathews, 98 U.S. 621, 626.
National Bank *v.* Whitman, 103 U.S. 99, 101.
Fort Worth Co. *v.* Smith Bridge Co., 151 U.S. 294, 301.

It is not *ultra vires* for a banking institution to put assets into the name of an individual as trustee.

Schofield *v.* State Bank, 97 Fed. Rep. 282; 38 C. C. A. 179.

"Acts done by the corporation which presuppose the existence of other acts to make them legally operative are presumptive proofs of the latter."

Mr. Justice Story in Bank *v.* Dandridge, 12 Wheat. 64, 70.

Applied as a general rule in the following cases:—

McNitt *v.* Turner, 16 Wall. 352, 363, 364.
Carpenter *v.* Rannels, 19 Wall. 138, 146.
Cornett *v.* Williams, 20 Wall. 226, 249, 250.
Keely *v.* Sanders, 99 U.S. 441, 447.
Railroad *v.* Keokuk Co., 131 U.S. 371, 381.
Knox Co. *v.* National Bank, 147 U.S. 91, 97.
City Railroad *v.* Citizens Railroad, 166 U.S. 557, 568.

"When a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contrary, be presumed to be valid."

Mr. Justice Swayne, in Railroad *v.* McCarthy, 96 U.S. 258, 267.
Lexington *v.* Butler, 14 Wall. 282, 296.
Louisville R.R. *v.* Louisville Trust Co., 174 U.S. 552, 573.
Fuller *v.* Scott, 8 Kans. 25, 33.
Waynick *v.* Richmond, 11 Kans. 488.
Bissell *v.* Railroad, 22 N.Y. 258, 290.
Monument Bank *v.* Globe Works, 101 Mass. 57.
Manufacturing Co. *v.* Canney, 54 N.H. 295, 324–327.
Chautauqua Bank *v.* Risley, 19 N.Y. 369, 381, 382.
Farmers Loan Co. *v.* Curtis, 7 N.Y. 466, 470, 471.
Alward *v.* Holmes, 10 Abbott, N.C. 96, 99, 101.
Roussin *v.* St. Louis Ins. Co., 15 Mo. 244, 248.
Hart *v.* Ins. Co. 21 Mo. 91, 93.
McIntire *v.* Preston, 10 Ill. 48, 62.
Union Water Co. *v.* Fluming Co., 22 Calif. 620, 628, 629.

The petitioner was a holder of these notes and guaranties for value and before maturity (Record, p. 67), and is therefore pre-

sumed to be a *bona fide* holder. There is no finding to the contrary.

Lexington *v.* Butler, 14 Wall. 282.
Carpenter *v.* Longan, 16 Wall. 271.
Chambers Co. *v.* Clews, 21 Wall. 317, 323.
San Antonio *v.* Mehaffy, 96 U.S. 312.
Louisville R.R. *v.* Louisville Trust Co., 174 U.S. 552, 575.

The legislature of Kansas has recognized the right of loan and trust companies to issue debenture bonds.

Chapter 23, Article 3, Section 15, of the Compiled Laws of Kansas of 1885, is as follows: —

"Section 15. Corporations shall have power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, and may execute bonds or promissory notes therefor, and may pledge the property and income of the corporation."

This was amended by Chapter 109, Section 1, of the Laws of Kansas for 1889, by adding thereto the following: —

"Provided, however, that the provisions of this section shall not apply to the debentures or bonds of any loan or trust company, duly incorporated under the provisions of this chapter, the payment of which debentures or bonds shall be secured by a transfer of real estate or by other securities for the benefit and protection of purchasers of said debentures or bonds; such collateral to be at least equal in amount to the par value of such bonds or debentures, and all real estate mortgage securities to be first liens on the property on which loans are made."

This act recognizes and ratifies the right of loan and trust companies to issue debenture bonds secured by first mortgages on real estate or by other securities. A debenture bond is "practically a note of the corporation secured by the securities as collateral; in other words, it is a note secured by a pledge of securities."

Cook on Corporations, 4th Ed., Vol. II., Section 776, p. 1777.

"The name is not of the slightest consequence."

Schofield, J., in Ward *v.* Johnson, 95 Ill. 215, 239.

There is no real distinction between such debenture bonds and the guaranties of the Trust Company in this case. The guaranties are obligations in the name of the Trust Company secured by a real estate mortgage and also by the signatures of the makers of the notes. The guaranties were made on May 9, 1889 (Record, p. 74), and were therefore fully authorized by the act which took effect on March 14, 1889. The charter of the Trust Company is broad enough to cover such choses in action as these guaranties secured by real estate.

Parkinson *v.* Bank, 60 Kans. 474, 477.
McCormick *v.* Market Bank, 165 U.S. 538, 550.

If under any possible circumstances the guaranty by the Trust Company of notes negotiated by a third party could be valid, such guaranties must in this case be presumed to be valid. Such a presumption would be warranted by any of the following suppositions: That the courts of Kansas might interpret the act of March 14, 1889, to apply to these guaranties as debentures and thus to authorize them; that Ethell might have negotiated the notes only as trustee for the Trust Company and for its benefit, and that the guaranties in that case would be valid; that the guaranties were within the charter powers of the Trust Company "to buy and sell personal property" and "choses in action of every kind and description"; or that the courts of Kansas would not hold such guaranties invalid under any circumstances. These presumptions should all be made in favor of the guaranties and the petitioner's judgment thereon.

If in order to sustain the legality of those guaranties other facts must exist, such as the fact that Ethell negotiated the notes only as trustee for the Trust Company and for its benefit, then those facts are presumptively proved by the act of the

Trust Company in making the guaranties. The contract is not necessarily beyond the scope of the power of the corporation, and in the absence of proof to the contrary it is presumed to be valid.

b.

If, however, these guaranties were *ultra vires*, and if the finding of the Circuit Court should be so interpreted, that would not be material after judgment on those guaranties (Fifth Assignment of Error). A judgment on an *ultra vires* claim is just as conclusive as a judgment on any other claim.

Franklin Co. *v.* German Bank, 142 U.S. 93.
U. S. *v.* New Orleans, 98 U.S. 381, 395, 397.
Wilson's Executor *v.* Deen, 121 U.S. 525, 534.
Board of Com'rs *v.* Platt, 79 Fed. Rep. 567, 572; 25 C. C. A. 87, 91.
Ætna Ins. Co. *v.* Lyon Co., 44 Fed. Rep. 329, 344.
U. S. *v.* Board of Auditors, 28 Fed. Rep. 407.

"A judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it."

Mr. Justice Field in Davis *v.* Brown, 94 U.S. 423, 428.
Cromwell *v.* County of Sac, *Ibid.* 351, 352.
Keokuk R.R. *v.* Missouri, 152 U.S. 301, 315.
Comstock *v.* Crawford, 3 Wall. 396, 406.
Grignon *v.* Astor, 2 How. 319, 340.

"What is implied in a record, pleading, will, deed, or contract is as effectual as what is expressed."

Mr. Justice Swayne in Cornett *v.* Williams, 20 Wall. 226, 250.
U. S. *v.* Babbitt, 1 Black, 55, 61.

The conclusiveness of a judgment does not depend upon the reasons for the judgment, but upon the fact of a judgment.

So. Pac. R.R. *v.* U. S., 168 U.S. 1, 48–52, and cases cited.
Citizens Bank *v.* Brigham, 61 Kans. 727.

A judgment by default is just as conclusive as one rendered after answer and contest.

Last Chance Mining Co. *v.* Tyler Mining Co., 157 U.S. 683, 691.

A judgment is binding although the cause of action was barred by a discharge in bankruptcy which was not pleaded.

Dimock *v.* Revere Copper Co., 117 U.S. 559.

So also though barred by the statute of limitations which was not pleaded.

Schnack *v.* Boyd, 59 Kans. 275, 278.
Head *v.* Daniels, 38 Kans. 1, 5.

So also though barred by usury which was not pleaded.

Charles *v.* Davis, 62 N.H. 375.

A foreclosure decree is binding upon parties and privies as to defences not set up.

Stout *v.* Lye, 103 U.S. 66.

The case of Schrader *v.* Manufacturers Bank, 133 U.S. 67, holds that after a national bank has gone into liquidation its officers have no authority to transact any new business in the name of the bank so as to bind its stockholders. The transaction upon which the judgment in that case was based took

place "about a year after the bank went into voluntary liquidation" (p. 77), while the suit in which that judgment was recovered "was not commenced until more than three years after the Manufacturers Bank went into liquidation." Such facts show fraud, and such a judgment would be a fraud on the stockholders, and on that ground they would not be bound by it.

The finding in the present case that the petitioner recovered judgment on these guaranties necessarily involves the finding that the Trust Company made the guaranties, and is conclusive on the Trust Company and the defendant. The respondent ought not to be permitted, under the guise of examining the petitioner's claim against the company, to allege that the petitioner has no valid claim against it, and without proof to impeach the petitioner's judgment against the company. To say that "dues" does not include such a judgment is only to say in another form of words that a conclusive judgment is not conclusive.

c.

There is no finding that the petitioner's judgment was obtained by fraud or collusion, but on the contrary the finding is that his "writ was served upon the president of said corporation" (Record, p. 6). In the absence of fraud and collusion no other ground is recognized by the courts of Kansas for permitting a stockholder to attack a judgment against the corporation.

"The nature of the liability and the time and mode of its enforcement are to be determined from the statutes, and not by the notions which particular courts might entertain as to what would be equitable and just in such cases. The provisions of the statute in question, which fix the liability of a stockholder, are plain, and leave little room for interpretation."

Johnston, J., in Sleeper *v.* Norris, 59 Kans. 555, 558.

Where a statute is clear and free from all ambiguity the letter of it is not to be disregarded.

St. Paul Railway *v.* Phelps, 137 U.S. 528, 536.
Bate Co. *v.* Sulzberger, 157 U.S. 1, 39, 40.
Lake Co. *v.* Rollins, 130 U.S. 662, 671.

If the respondent had apprehended any fraud, collusion, or dereliction of duty in the officers of the Trust Company, knowing as he did that the corporation was in financial straits and had not declared a dividend for two and a half years prior to the petitioner's suit against the company (Record, pp. 54, 55, 59, 60), he had the right to intervene and defend in that suit.

Fitzwater *v.* National Bank, 62 Kans. 163.
Mining Co. *v.* McKibben, 60 Kans. 387.

The Circuit Court found that these guaranties were "given upon a valuable consideration" (Record, p. 6). It is clear that the petitioner could recover that consideration, either directly upon the theory of estoppel or by an action of *quantum meruit*.

Central Trans. Co. *v.* Pullman Co., 139 U.S. 24, 57–61; 171 U.S. 138, 150, 151.

If the Trust Company had answered to the petitioner's suit and claimed that the guaranties were *ultra vires*, the petitioner might then have set up any facts necessary to permit him to recover for a *quantum meruit*. It must be presumed that the consideration paid the Trust Company for its guaranties was the amount which the petitioner recovered in his judgment against that company, even though his original petition was defective.

Manley *v.* Park, 62 Kans. 553.

The Trust Company and its stockholders have had the benefit of that money. There is certainly no equity in favor of the respondent stockholder which should permit him to impeach that judgment.

2.

There is no finding that the guaranties were not within the scope of the directors' resolution in form, apart from the finding

that they were not valid because not negotiated by the Trust Company.

Form 2 of the resolution (Record, p. 43) authorizes a guaranty of payment "within days after maturity," while the guaranties on the notes (Record, p. 74) guarantee payment "at maturity." Form 2 would authorize a guarantee of payment one day after maturity, while the actual obligation authorizes payment one day earlier than that. This is substantial agreement with the resolution. There is a presumption that the guaranties were within the powers of the corporation and its officers.

Bank *v.* Atkinson, 8 Kans. App. 30, 33.
Town Co. *v.* Swigart, 43 Kans. 292.
Morisette *v.* Howard, 62 Kans. 463.
Express Co. *v.* R.R., 99 U.S. 191, 199.

3.

"Ascertaining the relations of the parties under the contract, which resulted from the Kansas Constitution and the statutes and the defendant's ownership of stock, I find, so far as it is a question of fact, that the dues to be secured by the superadded stockholders' liability were such as were within the reasonable and proper scope of the business as contemplated by the parties, and that a guarantee of this character was not intended by the defendant stockholder, and was not contemplated by the Kansas Constitution as a due or a debt within such scope" (Record, p. 7).

a.

The contractual relation between the respondent stockholder and the petitioner creditor of the corporation is implied by law, and is not a question of fact in any sense.

Railroad *v.* Gebhard, 109 U.S. 527, 537, 538.
Howarth *v.* Lombard, 175 Mass. 570, 574–576, and cases cited.

It is conceded that the word "dues" includes all contractual obligations (Record, p. 90). This is in accordance with all the authorities.

Whitman *v.* Oxford National Bank, 176 U.S. 559, 563.
Chase *v.* Curtis, 113 U.S. 452, 463.
Rider *v.* Fritchey, 49 Oh. St. 285, 295.
Herrick *v.* Wardwell, 58 Oh. St. 294, 309.
Flenniken *v.* Marshall, 43 So. Car. 80, 85.

See also —

Grund *v.* Tucker, 5 Kans. 70, 77.
Haynes *v.* Brown, 36 N.H. 545, 566.
Smith *v.* Qmans, 17 Wisc. 395, 396.
Powell *v.* Oregonian Co., 36 Fed. Rep. 726; 38 Fed. Rep. 187.

Paragraph 1192 of the General Statutes of Kansas, 1889, is remedial and not penal.

Frame *v.* Ashley, 59 Kans. 477.
Cottrell *v.* Manlove, 58 Kans. 405.
Gen. Sts. of Kansas, 1889, par. 7281.

Paragraph 7281. "The rule of the common law, that suits in derogation thereof shall be strictly construed, shall not be applicable to any general statute of this State; but all such statutes shall be liberally construed to promote their object."

It is clear that the guaranties which were the petitioner's original claim against the Trust Company are contractual obligations. They are therefore "dues" within the meaning of the Constitution of Kansas (Third Assignment of Error). They cannot be construed a nullity after judgment upon them. If they are disregarded, however, the petitioner has a clear claim against the Trust Company for the value paid for them under the finding that they were "given upon a valuable considera-

tion" (Record, p. 6), and it must be presumed that the consideration paid the Trust Company for its guaranties was the amount which the petitioner recovered in his judgment against that company. In either case the petitioner has a valid judgment against the company which is contractual in its nature.

b.

The petitioner makes the further claim (Second Assignment of Error), that the execution returned unsatisfied, as found by the Circuit Court, is an execution against the effects of a corporation within the meaning of paragraph 1192 of the General Statutes of Kansas, 1889. This raises a question which is not limited to the interpretation of the word "dues" in the Constitution of Kansas. The constitutional provision, Article XII., Section 2, is mandatory, or at least directory, on the legislature of Kansas; but it is not a limitation on the power of the legislature to impose any liability it sees fit upon stockholders in corporations other than railways or religious or charitable corporations.

"The Constitution contains no grant of powers to the legislature. It is only a limitation on the exercise of its authority; and the legislature, in its discretion, has the right to pass any act not violative of the State or Federal constitutions."

Horton, C. J., in Castle *v.* Houston, 19 Kans. 417, 427.
Leavenworth Co. *v.* Miller, 7 Kans. 479.
Cooper *v.* Telfair, 4 Dallas, 14.
Fletcher *v.* Peck, 6 Cranch, 87, 135, 136.
Bolles *v.* Brimfield, 120 U.S. 759, 761.
Cooley on Constitutional Limitations, 6th ed., pp. 104–106, and cases cited.

If the word "dues" is construed to mean only a certain class of debts, the Constitution of Kansas does not prohibit the legislature from enacting such laws as it sees fit, to secure all kinds of liabilities from corporations by making their stockholders liable. It is submitted that this is what the legislature of Kansas has done in enacting paragraph 1192.

4.

It is immaterial what the respondent may have known about the business of the Trust Company with reference to these guaranties (Record, p. 7). To the petitioner's judgment on a contractual claim the respondent has no defence, whether he was cognizant of the transaction or not.

III.

Judgment Should Be Ordered for the Petitioner.

Under the material facts found, the general finding for the defendant was error. The special finding covers all the issues raised by the pleadings, and this Court should direct such judgment to be entered as the special finding requires.

Allen *v.* St. Louis Bank, 120 U.S. 20, 40.
Fort Scott *v.* Hickman, 112 U.S. 150, 165, and cases cited.
Evans *v.* Kister, 92 Fed. Rep. 828, 833; 35 C. C. A. 28, 33.

Under the foregoing authorities the petitioner asks this Court to reverse the judgment and order the Circuit Court to enter judgment for the petitioner for the amount claimed by him, five thousand dollars, with interest from the date of the writ, December 15, 1896 (Record, p. 3), at six per cent., and the petitioner's costs of this Court, the Circuit Court of Appeals, and the Circuit Court.

The plaintiff is entitled to interest, as damages for detention, from the date of the writ.

Pine *v.* Western Nat. Bank, 65 Pac. Rep. 690 (Kans.).
Casey *v.* Galli, 94 U.S. 673, 677.
Bowden *v.* Johnson, 107 U.S. 251, 263.
Burr *v.* Wilcox, 22 N.Y. 551, 557.
Mason *v.* Alexander, 44 Oh. St. 318, 336.
Bank *v.* McDonnell, 92 Ala. 387, 398.
Rikhoff *v.* Brown's Machine Co., 68 Ind. 388, 390.
Allen *v.* Fairbanks, 45 Fed. Rep. 445.
3 Thompson, Corporations, sect. 3133.

The same principle is applicable as in cases where interest is allowed in excess of the penalty of a bond.

Ives *v.* Merchants Bank, 12 How. 159.
U. S. *v.* Arnold, 1 Gallison, 348, 360; 9 Cranch, 104.
Bank of U. S. *v.* Magill, 1 Paine, 661, 669.
Burchfield *v.* Haffey, 34 Kans. 42.
Judge of Probate *v.* Heydock, 8 N.H. 491, 494.
Wyman *v.* Robinson, 73 Maine, 384.
Bank of Brighton *v.* Smith, 12 Allen, 243, 251–253.

See as to costs —

Abbey *v.* Long, 44 Kans. 688, 693.

The rate of interest should be six per cent.

Public Statutes of New Hampshire, 1891, Chap. 203, Sect. 1: "In rendering judgments, and in all business transactions where interest is paid or secured, it shall be computed and paid at the rate of six dollars on a hundred dollars for one year, unless a lower rate is expressly stipulated."

IV.

The Petitioner Is Entitled to Judgment upon All the Evidence.

The petitioner duly presented his propositions of law and requested the Circuit Court to rule on them; and the Court considered them and did rule on them (Record, p. 9). The refusal of the Court to adopt them in the decision of this case gives the petitioner a right of exception.

Norris *v.* Jackson, 9 Wall. 125, 128.
Ins. Co. *v.* Sea, 21 Wall. 158, 160.
Lehnen *v.* Dickson, 148 U.S. 71, 73.
Mercantile Trust Co. *v.* Wood, 60 Fed. Rep. 346, 348; 8 C. C. A. 658.
Clement *v.* Phœnix Ins. Co., 7 Blatchf. 51, 53.

The petitioner requested the Circuit Court to rule that upon all the evidence in the case he was entitled to recover as a matter of law (First Assignment of Error). His exception to the refusal of the Court to give this ruling raises a question of law.

St. Louis *v.* Western Union Tel. Co., 148 U.S. 92, 96.
Lehnen *v.* Dickson, 148 U.S. 71, 73.
Ins. Co. *v.* Folsom, 18 Wall. 237, 251.
World's Col. Exp. *v.* France, 96 Fed. Rep. 687, 689; 38 C. C. A. 483.

If for any reason this Court shall say that the petitioner is not entitled to recover upon the facts specially found by the Circuit Court, the petitioner maintains that he is entitled to a new trial upon his exceptions to the refusal of the Circuit Court to give the rulings set out in his assignments of error 1, 2, 3, 4, and 5 (Record, pp. 9, 13, 14).

The petitioner's judgment and execution stand unattacked (Record, pp. 66–86) and are conclusive on the respondent, as has already been argued. The existence of the corporation was not denied. The charter was in evidence (Record, p. 28), and also the corporate records showing its organization (Record, pp. 41, 42). It is not a railway or a religious or charitable corporation (Record, pp. 6, 28).

The respondent admitted in his deposition that he purchased one hundred shares of the Trust Company in 1888 of a par value of fifty dollars a share (p. 51, Ints. 3, 4); that on June 9, 1894, he transferred these shares to Frederick E. Kingsbury (p. 52, Ints. 5, 6), who was his grandson (p. 61, Int. 2); that the transfer was without any consideration (p. 56, Cr. Int. 39); that his grandson at that time had no visible attachable property (p. 57, Cr. Ints. 44, 45) and had none at the time of this action (p. 57, Cr. Ints. 45, 46; p. 63, Cr. Int. 32); that he knew business was oppressed in 1893 and 1894, and Kansas companies stopped paying dividends, and as a general thing had to succumb (pp. 59, 60, Cr. Ints. 75, 76, 79, 80); that he would suspect something was wrong if any company passed its divi-

dends (p. 55, Cr. Ints. 15, 16, 17, 18); that he received no dividends from the Trust Company after July 1, 1890 (p. 54, Cr. Ints. 4, 8, 9, 10, 11); that he had already been sued on his Kansas stockholder's liability in another company before he transferred these shares (p. 53, Ints. 20, 21, 22); and that he transferred these shares "to avoid expense of defending suits and trouble," and considered there was value in the stock, and he had rather the value of the stock should go to his family than to expend it in defending suits (p. 53, Ints. 20, 21, 22; p. 56, Cr. Ints. 28, 29, 33, 34, 35).

James A. Troutman, the president of the Trust Company, testified that the company was insolvent on January 1, 1891, and since that time (Record, p. 32, Ints. 34, 35); and that it issued no financial statement later than August 26, 1891 (Record, p. 33, Ints. 40, 41, 42). This evidence was not contradicted.

Upon the foregoing testimony and admissions of the respondent and his grandson, the Circuit Court found as a fact "that the transfer was not such a *bona fide* transfer as to relieve the defendant from his individual liability as a stockholder if he were otherwise liable" (Record, p. 6). Upon those facts the Circuit Court was bound as a matter of law to find that the transfer was colorable and that the respondent was still liable as a stockholder. Indeed, this is not disputed.

VanDemark *v.* Barons, 52 Kans. 779, 782.
Johnson *v.* Laflin, 5 Dillon, 65; 103 U.S. 800.
National Bank *v.* Case, 99 U.S. 628.
Bowden *v.* Johnson, 107 U.S. 251.
Pauly *v.* Trust Co., 165 U.S. 606, 619.
Stuart *v.* Hayden, 169 U.S. 1, 9.
Foster *v.* Lincoln, 79 Fed. Rep. 170; 24 C. C. A. 470.
Cox *v.* Montague, 78 Fed. Rep. 845; 24 C. C. A. 364.
Houghton *v.* Hubbell, 91 Fed. Rep. 453; 33 C. C. A. 574.
Corey *v.* Morrill, 71 Vt. 51, 57.
Rider *v.* Fritchey, 49 Oh. St. 285.
Pinkerton *v.* R.R., 42 N.H. 424.
Coolidge *v.* Melvin, 42 N.H. 510.
Gove *v.* Campbell, 62 N.H. 401.

The only defence made by the respondent is that the guaranties upon which the petitioner's judgment against the Trust Company was obtained were *ultra vires*. The petitioner replies that there is not a scintilla of evidence tending to show that the guaranties were *ultra vires* in any of the depositions nor in the record evidence, except what may be argued from the judgment record.

A judgment conclusively establishing that the petitioner's claim is valid against the Trust Company is not evidence that his claim is *ultra vires*. A judgment does not impeach itself.

Not only is the judgment record no evidence of *ultra vires*, but on the face of the record it appears affirmatively that the guaranties were negotiated by Ethell entirely for the benefit of the Trust Company. That record shows that the notes in question were endorsed by Ethell "without recourse" (Record, p. 74); "that at the time of the endorsement of said notes to this plaintiff" the Trust Company guaranteed the payment of them for value (p. 67); that they were payable at the office of the Trust Company (p. 73); that the mortgage deed given to secure the notes ran to a trustee for the benefit of the Trust Company (pp. 74–77); and that the Trust Company had the exclusive right to declare the notes due upon any default, to demand the foreclosure of the mortgage, and to receive the proceeds of the mortgage to protect it on its guaranties (p. 77).

This Court has held that there is no inference that an endorsement "without recourse" is for value paid to the endorser.

"Nor under this endorsement, which is an assignment of the note without expressing value received, and that, too, without recourse against the assignor, can it be fairly inferred that the nominal value of the note was actually paid."

> Chief Justice Marshall in Welch *v.* Lindo, 7 Cranch, 159, 163.
> See Robinson *v.* Lincoln, 5 Met. (Mass.) 201, 204.

The guaranties are expressed to be for a valuable consideration. It is a fair inference from the foregoing facts that the value was paid to the Trust Company at the time these notes

were negotiated and guaranteed, and that the Trust Company was the party beneficially interested in the transaction. The vote of the directors (Record, p. 43) authorized the guaranty of "securities negotiated by the company." The presumption must be that these securities were really negotiated by the company, in the absence of evidence to the contrary. They are endorsed "Negotiated by The Western Investment Loan and Trust Company, Topeka, Kans." (p. 74).

The notes and mortgage deed are to be construed together.

Moline Plow Co. *v.* Webb, 141 U.S. 616, 625.

The Trust Company seems to have followed the usual course of business in Kansas.

Crissey *v.* Loan Co., 59 Kans. 561, 562.
See Van Pelt *v.* Strickland, 60 Kans. 584.

In addition to the statutes already cited, the petitioner would call attention to the following paragraphs of the Compiled Laws of Kansas of 1885: —

"(1136) Section 11. Every corporation, as such, has power:

"Sixth. To make by-laws, not inconsistent with existing laws, for the management of its property, the regulation of its affairs, and for the transfer of its stock.

"Seventh. To enter into any obligation or contract essential to the transaction of its ordinary affairs."

The following decisions of the Supreme Court of Kansas seem to sustain the petitioner's position: —

Commercial Bank *v.* Provident Institution, 59 Kans. 361, 365, and cases cited.
Railroad *v.* Johnson, 58 Kans. 175.
Railroad *v.* Fletcher, 35 Kans. 236, 250.

The case of Commercial Bank *v.* Provident Institution, in particular, seems to imply that if the guaranty is made in the

interest of the bank it would not be *ultra vires*, and, in any event, that every presumption should be made in its favor.

In that case it is said at page 364 : —

"The record before us does not contain any of the evidence offered at the trial. The general finding resolves all doubt as to the facts against the plaintiff in error. We must, therefore, presume that the guaranty was executed for a valuable consideration, by the duly authorized officers of the bank, and in due course of business. The claim that a banking institution dealing in commercial paper is without authority to bind itself by a guaranty thereof has nothing to commend it to especial favor. It is true that in this case the paper itself does not indicate that the Commercial Bank ever owned it. Nevertheless it may have received the proceeds, and the guaranty may have been made strictly in the interest of the bank."

Under the law of Kansas (General Statutes of 1889) a contract in writing imports a consideration.

Paragraph 1104. "All contracts in writing, signed by the party bound thereby, or his authorized agent or attorney, shall import a consideration."

The pleadings in the petitioner's action against the Trust Company allege a consideration paid by the petitioner in purchasing the note with the guaranties (Record, pp. 67, 68, 69). His judgment conclusively establishes that. The burden of proof is on the respondent to show that the guaranties were *ultra vires*. He has failed to produce any such proof.

As already argued, every presumption should be made in support of the validity of the petitioner's judgment against the Trust Company on these guaranties. There is no evidence whatever to impeach that judgment. The guaranties on the face of the record do not appear to be necessarily beyond the scope of the power of the corporation; they appear to be authorized under Chapter 109 of the laws of Kansas of 1889; they appear to have been negotiated by Ethell for the benefit of the Trust Company and not of himself; the act of the Trust Company in making them is presumptive proof of any facts necessary to make them legally operative; they were "given upon a valuable consideration," as the Circuit Court found; and the petitioner

must be presumed upon all the evidence to be a *bona fide* holder of them. In the utter absence of any evidence to invalidate them, the Circuit Court was bound to enforce the petitioner's judgment upon them (Thirteenth Assignment of Error).

Hancock Bank *v.* Farnum, 176 U.S. 640.

There is no evidence of *ultra vires*, and the petitioner is entitled to recover on all the evidence as a matter of law.

The second assignment of error raises the question that the petitioner's execution is an execution against the effects of a corporation within the meaning of paragraph 1192, and that such an execution is not limited by the word "dues" in the constitution.

The third assignment of error raises the question that the petitioner's judgment and execution are included in the word "dues" of the Constitution of Kansas, and are contractual obligations, founded either upon the guaranties of the Trust Company, or, rejecting them, upon a *quantum meruit* for the value paid for those guaranties.

The fourth assignment of error raises the question that those guaranties are not *ultra vires*.

The fifth assignment of error raises the question that if they are *ultra vires* that fact is immaterial, after judgment upon them, and is no defence.

These questions have all been fully argued by the petitioner upon the proposition that the facts specially found require a judgment for the petitioner. He reaffirms those arguments and authorities in arguing that he is entitled to recover upon all the evidence as a matter of law.

If the petitioner is not entitled to judgment upon the facts found, he is certainly entitled to a new trial for the refusal of the Circuit Court to give the rulings requested by him, and in that case the judgment should be reversed.

WILLIAM REED BIGELOW,
E. L. WATERMAN,
PARK B. PULSIFER,
Attorneys for Petitioner.

No. 558. 245.

FEB 23 1901

JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

By. of Frink for Respondent.

OCTOBER TERM, 1900.

No. 558. Filed Feb. 23, 1901.

HENRY L. WARD, TREASURER, *Petitioner*,

v.

EDWARD JOSLIN, *Respondent*.

IN THE MATTER OF THE PETITION OF

HENRY L. WARD, TREASURER,

FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT.

J. S. H. FRINK,

Attorney for Respondent.

PORTSMOUTH, N. H.

PRESS OF TIMES PUBLISHING CO.

1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 558.

HENRY L. WARD, TREASURER, *Petitioner*,

v.

EDWARD JOSLIN, *Respondent.*

IN THE MATTER OF THE PETITION OF

HENRY L. WARD, TREASURER,

FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT.

We do not suppose that in this petition for certiorari it is either necessary or proper to discuss this whole case. If the writ should issue, then an opportunity will be had for full discussion. The only question arising upon this petition is whether questions of such gravity and importance are involved as to require or justify a review by the Supreme Court. We can best determine that question by consideration of the opinion of the Circuit Court of Appeals. The essential questions determined by that court were:—

(1) Whether under the general rule of banking law, a banking corporation has power, independent of any organic authority, to guarantee the notes of third parties in which it has no interest. The decision was entirely in accord with the general rule of commercial paper.

(2) Whether or not the laws of Kansas authorized such a guaranty, and the court found that it did not. This decision seems entirely right, but even if it were not, it would not present a question of such gravity and importance as to require a review by this court.

(3) Finally the court held that an unauthorized guaranty—a guaranty *ultra vires* the corporation itself—was not comprehended in the term "dues" as used in the Constitution and Statutes of Kansas. A full consideration of the reasoning and authorities, which it seems unnecessary to cite in this application, seems to lead irresistibly to this conclusion.

We know no rule excepting the judgment of the judges of the Supreme Court by which to determine what cases will be deemed by them to be of such gravity as to demand a review.

This application, as we apprehend it, does not proceed upon the basis that there is any Federal question involved in this case. If there had been, writ of error would seem to have been a more appropriate proceeding.

The case In re Woods, Petitioner, 143 U. S. 202, seems to involve questions more nearly analogous to the one under consideration than any other with which we are familiar.

J. S. H. FRINK,
Attorney for Respondent.

2805

No. 245.

Brief of Frink for Respondents.

Office Supreme Court U.S.
FILED
MAR 29 1902
JAMES H. McKENNEY,

Filed Mar. 29, 1902.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 245.

HENRY L. WARD, PETITIONER,

vs.

EDWARD JOSLIN, DECEASED, RESPONDENT,

HIRAM BLAKE AND WALLACE L. MASON,
EXECUTORS.

BRIEF FOR RESPONDENTS,

BY J. S. H. FRINK.

JOURNAL JOB PRINT, PORTSMOUTH, N. H.

28098

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 245.

HENRY L. WARD, PETITIONER,

vs.

EDWARD JOSLIN, DECEASED, RESPONDENT,

HIRAM BLAKE AND WALLACE L. MASON, EXECUTORS.

BRIEF FOR DEFENDANTS.

STATEMENT OF MATERIAL FACTS.

A creditor of a Kansas corporation having obtained judgment against the corporation in Kansas, which is unsatisfied, brings in New Hampshire this suit against a stockholder to enforce the individual liability prescribed under the laws and constitution of the State of Kansas.

The case was tried before the Circuit Judge without a jury.

To establish his case, the plaintiff put in evidence a certified copy of the record setting forth the basis of the judgment against the corporation.

From this record of the judgment, introduced by the plaintiff, the Circuit Court found as a *matter of fact*, upon the evidence contained in the record, and upon the argu-

ments, that the plaintiff's claim against the corporation (Loan and Trust Company) was *upon a guaranty* given upon a valuable consideration, of the payment of certain promissory notes, from one third party to another, and *was not a guaranty of the payment of securities negotiated by the company.*

Record p. 6.

And as a further proposition of fact the court also found that the guaranty was not within the reasonable and proper scope of the business of the corporation as contemplated by the parties.

Record, p. 7. See also opinion of Judge Aldrich, 100 *Fed.* 677.

We quote further from the findings of fact by the Circuit Judge.

Mr. Justice Aldrich found as a matter of fact, that the business of the corporation (in which the defendant was a stockholder) was "to buy and sell personal property, including stocks, bonds, bills, notes, real and chattel mortgages, and choses in action of every kind and description, and to transact the business of a loan and trust company," and he proceeds to say:—

"Some time after the organization of the company, and before the defendant became a stockholder, the directors thereof resolved 'that the president and secretary of the company be, and they hereby are, authorized to guarantee the payment of all securities negotiated by the company by indorsing upon any such security one of the following forms of a guarantee;' and the resolution of the corporation and the forms of guarantees printed in the record are referred to and made a part of the findings."

He adds "Ascertaining the relations of the parties under the contract, which resulted from the Kansas constitution and the statutes and the defendant's ownership of stock, I find, so far as it is a question of fact, that the dues to be secured by the superadded stockholders' liability

were such as were within the reasonable and proper scope of the business as contemplated by the parties, and that a guarantee of this character was not intended by the defendant stockholder, and was not contemplated by the Kansas constitution as a due or a debt within such scope. I also find, so far as it is a fact, that it was not within the scope of the resolution which assumed to authorize the president and secretary to guarantee securities *negotiated* by the company, and there is no evidence that the defendant stockholder had knowledge that the company was assuming, through its president and secretary, to guarantee the payment of claims *not negotiated* by itself; and there being no evidence of notice, I find, as a matter of fact, that he was not aware of it.

"I also make a general finding for the defendant."

Finding of facts by Aldrich Judge,

Pages 6 and 7 of the Record, also charter of corporation page 28 of the Record.

(In this brief we refer to the numbers at top of pages of Record.)

The form of guaranty adopted by the Directors, to which the Circuit Judge refers and makes part of his findings of fact, is in these words:—

"For a valuable consideration the Western Investment Loan and Trust Company hereby guarantees payment of the within obligation, both interest and principal, at maturity.

See page 69 Record.

It appeared that on the 12th day of September, 1888, S. S. Hite and Mary L. Hite executed and delivered to one J. E. Ethell their certain promissory notes, in writing, of that date, whereby, for value received, they promised to pay to the order of said J. E. Ethell, on the 12th day of September, A. D., 1892, the principal sum, with interest thereon at the rate of seven per cent per annum, from date until paid, payable semi-annually, according to tenor of

eight (8) interest coupons, bearing even date, and annexed to said note. Said principal and interest being payable at the office of the Western Investment Loan & Trust Company at Topeka, Kansas; that afterwards, and before the maturity of said notes, Ethell, for a valuable consideration, endorsed, transferred and delivered the said notes to this plaintiff.

About the time of the endorsement of said notes to the plaintiff by said Ethell the said Western Investment Loan & Trust Company, in writing, guaranteed the payment of the same in words before recited.

See original petition, Record, p. 66-72.
Also record of judgment, pages 81-82 of Record.

Said notes and mortgage not having been satisfied, this plaintiff brought suit against The Western Investment Loan & Trust Company on said guarantee, and recovered judgment against said company by default; the execution issued on said judgment having been returned "*nulla bona*," the Plaintiff brought this suit against the defendant to recover of him, as an alleged stockholder in said Western Investment Loan & Trust Company, the amount of his stock, under the Constitution and Statutes of Kansas.

Upon this statement of the pivotal facts in the case, the defendant claims:—

I. That the guaranty of these notes of a third party, was not within the scope of the powers of this corporation, under its organic law, nor incident to the transaction of the business for which it was established, and was therefore "ultra vires the corporation itself," and formed no basis for a judgment.

II. That the finding of the Circuit Court upon these questions, so far as they are findings of fact, are not reviewable in an appellate Court, and that the conclusions

of the Circuit Court are fully sustained by an inspection of the record, and the application of the general law, to the facts found.

III. That under the laws and constitution of Kansas a claim "ultra vires the corporation" is not one of a class for which a stockholder is liable, and constitutes a risk which he could not anticipate and has never undertaken.

IV. That for the purpose of determining whether the judgment attempted to be enforced against a stockholder is of a class for which he is liable, and comes within the intendment of the laws and constitution of Kansas, imposing individual liability, the judgment may be re-examined.

GUARANTY NOT WITHIN POWERS OF THE CORPORATION.

We submit, that this contract of guaranty was not within the chartered powers of said Western Investment Loan & Trust Co.

It is elementary law that a corporation has power only to do such business as it is authorized to do by its Act of Incorporation and no other.

If it exceeds its chartered powers, those who have subscribed for its stock may avoid any contract made by the corporation in excess of its powers.

Of course, in construing the chartered powers of a corporation, not only the powers specifically granted, but those implied powers necessary to carry into effect those granted, are included.

To enable this corporation to transact the business contemplated in its charter, it was not necessary for it to guarantee the securities of these parties. The very fact that it transacted its business for some time without exercising this power, shows it was not a necessary incident.

A man might be entirely willing to embark his money in a corporation that simply bought and sold notes and mortgages, but when it came to the business of guaranteeing the payment of the contracts of third parties, in which the company had only a commission interest, and which involved hazards and amounts not anticipated, a party might be entirely unwilling to become a stockholder.

The business by this act was converted from the comparatively safe one contemplated by the charter, to one involving risks of great magnitude.

If it had appeared that these notes were the property of the Kansas Investment Loan & Trust Company at the time of the guaranty, and negotiated by it, such an act would be within its chartered powers, but no such fact appears. It appears that the notes, etc. were given to one Ethell, and endorsed directly to the plaintiff, by him, and the petition and judgment nowhere recites or sets forth any title in or negotiation of them, by the Loan and Trust Company.

The articles of association as well as the findings of the Circuit Court, show that this Corporation had no power to guarantee their payment.

The case stands upon the proof that the company guaranteed, without any interest in them, the notes of third parties, for a consideration. The rule that the individual stockholders cannot question the corporate acts of the directors, has no application, because this question goes to their powers, not to any irregularity in the mode of exercising a power.

Upon the question as to the authority of the company to guarantee the payment of these notes, we quote from *National Park Bank vs. German-American Company*, 116

N. Y. 281, because it seems to state the law concisely and correctly :—

"Counsel have not directed our attention to, nor have we found in any of the statutes referred to, a provision empowering the defendant to bind itself by making or endorsing promissory notes for the accommodation of the makers, for a consideration paid. It is well settled that such a power is not incidental to the powers expressly conferred on corporations organized under statutes authorizing the formation of corporations for banking, insuring, manufacturing and like business corporations."

If it is said this question of authority is one of local, not general, law; we find nothing in the statutes or decisions of Kansas sustaining any different rule from the general one before stated.

This question was carefully considered by Judge Putnam of the Court of Appeals, as appears by his opinion; and a somewhat careful investigation of the later decisions discovers nothing in conflict with his conclusions.

We only repeat what the Court of Appeals has said in its opinion on *page 88 of the Record*, that while, under the laws of Kansas, banking corporations are authorized to buy and sell, exchange, and discount negotiable paper, yet nowhere is authority given them to guarantee notes of third parties, not created in the ordinary course of its business, and which they do not own.

This is not simply an undertaking entered into by an officer of the bank without authority on his part to bind the bank, but an undertaking which the bank itself could not make or authorize any of its officers to make for it.

The promise of the bank was beyond the scope of its powers and absolutely null and void; the judgment rests upon no cause of action whatever.

Brownsville v. Loague 129 *U. S.* 494, 503-505.

Central Transportation Co. v. Pullman Car Co. 139 *U. S.* 24, 59-60.

Among the purposes for which a private corporation may be organized in Kansas, by individual association, is the establishment of Loan and Trust Companies.

Stat. Kansas Sec. 1156 *Ch.* 23.

A charter must be prepared setting forth :—

1st, The name of the corporation.

2nd, *The purposes for which it is formed.*

3rd, The place where its business is to be transacted.

4th, The term for which it is to exist.

5th, The names and residences of its directors.

6th, The amount of its capital stock and number of shares.

Sec. 1161.

Among the powers conferred upon corporations in that state, is the one to enter into any obligation or contract essential to the transaction of its ordinary affairs.

Sec. 1167.

Sec. 1183 provides that no corporation created under the powers of this act shall employ its stock, means, assets, or other property, directly or indirectly, for any other purpose whatever, than to accomplish the legitimate objects of its creation.

This last provision is one of limitation.

We find but two decided cases in Kansas bearing remotely, even, upon the abstract proposition as to the powers of a loan and trust association in that state to bind itself by a guaranty of the obligations of a third party not belonging to it.

Commercial Bank v. The Cheshire Provident Institute, 59 *Kansas,* 361.

Atchison, T. & S. F. R. Co. v. Fletcher, 35 *Kansas* 236.

The former case discusses briefly the power of a banking association in its ordinary course of business to guarantee the payment of obligations, which it negotiates, and which belong to the bank, and arrives at the conclusion that in its ordinary course of business it possesses that power. This is a proposition so elementary that no one will quarrel with it.

The court then makes some strictures upon ultra vires as a defence to corporate contracts and arrives at a conclusion to the effect that such a defence is not open to a corporation having received the benefits of the transaction; an opinion which is at variance, as we understand it, with the rule in

Cent. Transp. Co. v. Pullman Car Co. 139 *U. S.* 24.

that such defence is still open to the corporation.

This decision does not affect the case at bar, for there is no evidence that the Loan and Trust Co. ever received the consideration accruing from the sale of these securities; but we are considering now the power of a banking institution in Kansas to guarantee the payment of notes not owned or negotiated by it, and this case is certainly no authority in favor of that proposition.

If you can gather any conclusion from the opinion as to the power of a loan and trust company in that state to guarantee the payment of the obligation of a third party in which the bank does not own or negotiate, *abstractly* considered, it is that it does not possess that power, although, under some circumstances a corporation may be estopped to deny the transaction.

In that case, there having been a general finding or verdict against the corporation, judgment was ordered in

favor of the party, on the ground, that a general finding must be predicated upon the hypothesis that the question of the power to make the guaranty had been adjudicated. The Court says :—

"The record before us does not contain any of the evidence offered at the trial. The general finding resolves all doubt as to the facts against the plaintiff in error. We must, therefore, presume that the guaranty was executed for a valuable consideration, by the duly authorized officers of the bank, and in due course of business. The claim that a banking institution dealing in commercial paper is without authority to bind itself by a guaranty thereof, has nothing to commend it to especial favor. It is true that, in this case, the paper itself does not indicate that the Commercial bank ever owned it. Nevertheless, it may have received the proceeds, and the guaranty may have been made strictly in the interest of the bank."

The latter case in order of citation *Atchison, &c. R. Co. v. Fletcher*, assuming the premises to be correct that the Atchison Company could receive, in the transaction of its legitimate business, bonds and other negotiable paper, proceeds to say, that having received such negotiable instruments, it may sell and dispose of the same ; and in selling and disposing of the same it may guarantee that they are genuine, and it may also guarantee the payment thereof.

This is only an iteration of the familiar rule of negotiable instruments, and if the company negotiating the same had been in that case a Loan & Trust Company one could well argue by the rule of exclusion, that such power did not reside in a party not owning the obligations guaranteed.

So far as the *usage* of Loan & Trust Companies in that State, to guarantee the payment of the obligations of third

parties, is under consideration, it is a question of fact not of law.

The Circuit Court has determined the question adversely to the plaintiff in error.

SPECIAL FINDINGS OF FACTS.

This was a jury waived case. The findings of fact by the court have the same force and effect as the verdict of the jury. The facts found by the trial justice are conclusive, where there is sufficient evidence to support them, although it may be conflicting.

Grayson v. Lynch, 163 *U. S.*, 468-471.

Rev. St. U. S. 2d Ed. Sec. 649 *and* 700.

The special finding of facts is found on pages 6-7 *of the Record.* The court will not review them unless it clearly appears there was nothing in the evidence to sustain them. The material facts found upon the part of the case before this Court are :—

(1) That the plaintiff's claim against the Loan and Trust Company was upon a guaranty given upon a valuable consideration, of the payment of certain promissory notes from one third party to another, and was not a guaranty of the payment of securities negotiated by the company.

(2) That the business which the corporation was authorized to do was to buy and sell personal property, including stocks, bonds, bills, notes, real and chattel mortgages, and choses in action of every kind and description, and to transact the business of a loan and trust company, and did not include the guaranty of the notes of those parties for a consideration.

(3) That some time after the organization of the Loan & Trust Company and before the defendant became a stockholder, the directors resolved that the president and

secretary of the company be and thereby were authorized to guarantee the payment of all securities *negotiated* by the company by indorsing upon such security a form of guaranty prescribed by the company.

(4) That the dues to be secured by the superadded stockholders' liability were such as were within the reasonable and proper scope of the business of the corporation as contemplated by the parties.

(5) That this guaranty was not intended by the defendant stockholder, and was not contemplated by the Kansas constitution, as a due or debt within such scope.

(6) That such guaranty was not within the scope of the resolution, which assumed to authorize the president and secretary to guarantee securities *negotiated* by the company.

(7) That the defendant had no notice that the company was assuming to guarantee the payment of claims not negotiated by itself.

(8) That there was no evidence of the fact that the defendant had notice of such assumption to guarantee.

Of these findings Nos. 1, 2, 3, 6, 7, 8, would seem to present only questions of fact, while Nos. 4 and 5 may embrace mixed questions of law and of fact, but they must be construed to find as a matter of fact that the guaranty of these notes was not within the reasonable and proper scope of the business of the defendant loan and trust company.

THIS CLAIM ON WHICH JUDGMENT IS BASED NOT ONE CONTEMPLATED BY THE CONSTITUTION OF KANSAS.

The Constitution of Kansas, Article 12, Sec. 2, provides that

"Dues from corporation shall be secured by individual

liability of the stockholders to an additional amount equal to the stock owned by each stockholder."

The question arises, what is meant by the terms "dues" as applied to a stockholder? Does it include every obligation against the corporation however incurred, and which may have become in some way the subject of a judgment against the corporation; or only such "dues" as the corporation can lawfully incur, and such as the stockholder might have reasonably anticipated in his subscription for stock?

In other words, assuming that the primary obligation here was one which the corporation had no power whatever to contract, and was one which was absolutely incapable of ratification, does it, so far as a stockholder is concerned, become a corporate "due" for which he is liable under the constitution of Kansas?

We are unable to call the attention of the Court to any case sustaining very satisfactorily the one view or the other.

From remarks of the Court in certain cases, and by a parity of reasoning in others, as well as the application of equitable principles to the question, it would seem that the true rule of construction should be that the framers of the Kansas constitution did not intend that stockholders should be responsible for every class of obligations.

Thus in *McCormick v. Market Bank*, 165 *U. S.* 538, 549, this Court assigned as one of three grounds why a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, the interest of stockholders not to be subjected to risks which they have never undertaken.

This suggestion is repeated in

Concord First National Bank, v. Hawkins 174 *U. S.* 364, 371.

California Bank v. Kenney, 167 *U. S.* 362, 368.

To make application of this oft repeated assertion to this case, it would seem that this undertaking of guaranty, being void and incapable of ratification, and of forming any basis for an action, did not constitute a risk which the stockholder assumed when he subscribed for or purchased his stock, and hence was one which could never have been intended to be imposed upon him under the constitution of Kansas. This liability the Courts have holden is contractual, and is it not the office of this Court to protect one of the parties to the contract against a risk, which he never intended to undertake?

The fact that there may be a class of "dues or debts" for which a stockholder may not be liable seems to be recognized in

Cook on Corporations, 4*th Ed.*, *Sec.* 224.

In the recent case of *Whitman v. Oxford National Bank*, 176 *U. S.*, 562, Mr. Justice Brewer says:

"The word dues is one of general significance and includes all contractual obligations."

An obligation which the corporation had no right to incur, we maintain, cannot be a contractual obligation. It is not such an obligation as the creditors of the corporation are supposed to contract with reference to, nor is it such an obligation as the stockholders in their subscription for stock were supposed to apprehend would be incurred by them. It cannot be said that the stockholder in his subscription for, or purchase of, stock agreed or contracted to be subject to any sueh obligation.

There is no injustice to either party to a pretended contract absolutely unauthorized, in holding that such an alleged contract is not fairly included in the obligations to which the superadded liability of a stockholder attaches.

It protects the stockholder from risks he did not intend to assume, and it does no wrong to the other party, because he had ample notice, or might have had upon enquiry, of the scope of the powers of the corporation to enter inte such a contract.

CONCLUSIVENESS OF JUDGMENT.

But it is claimed that the judgment found against the Loan and Trust Company in Kansas is conclusive as to all these prior propositions and cannot be re-examined.

It is elementary law that judgments may be impeached for fraud and want of jurisdiction. This is recognized as the local law of Kansas.

Ball v. Rees & als. 58 *Kansas*, 614.

And other cases.

We are not quite sure that it cannot reasonably be asserted that a judgment based upon a contract, not within the scope of a corporation to make, obtained by default, without the knowledge of a stockholder is not fraudulent as to the stockholder.

But assuming our premises to be correct, that this is an "ultra vires" contract, beyond the scope of the corporation to make, and that such a contract is not in the intendment of the constitution and laws of Kansas, attaching individual liability to corporate stockholders, it would seem to follow that the judgment might be re-examined to determine whether the contract, which is the basis of this judgment, is one within the constitutional intent or not.

For illustration, a judgment is the highest evidence of a "debt or due." The Supreme Court has expressed some doubt as to whether a claim arising from a tort is comprehended under the term "due," either before or after judgment.

Whitman v. Oxford Nat. Bank, 176 *U. S.* 559–562.

Is a stockholder desiring to raise that question estopped from re-examining the judgment so far as to enable him to ascertain, whether the judgment is founded on a tort or not?

The theory for declining to re-examine a judgment is predicated upon the assumption that the corporation represents the stockholder, and the judgment is conclusive against the corporation and its *privies*. Our answer to this is, that a stockholder is in no sense a privy to a judgment on a contract, not of a class for which he legally assumed the risk.

It is a familiar rule, so well settled that it does not require reference to authorities to support it, that the judgment against the corporation is no evidence that the party said to be individually liable is a stockholder. That question of course does not arise and is not adjudicated in the action against the corporation. It would seem that the question as to whether the "debt or due" upon which the action is based against the corporation itself, is one for which the stockholder is holden under the constitution, is one that does not arise and is not adjudicated in the original action. The one question is just as independent of the issues in the suit against the corporation as the other.

The plaintiff's final contention is, that this judgment against the Loan and Trust Company is conclusive adjudication of whatever is essential to support the judgment.

If, as we have attempted to show, the defendant was *not a privy* to that judgment, because it was based upon a contract not within the intendment of the Kansas constitution, the judgment does not bind him. "Quoad" such a claim he is not a stockholder. A further claim is, that the judgment is a conclusive determination that the contract

was a legal one, and it is not open to defendant *for any purpose* to show that it was "ultra vires."

Such an argument can be based only upon the application of the doctrine of estoppel, so far as the corporation is concerned. That estoppel extends to the stockholder because of representation by the corporation of his interests, if he is a privy to the judgment, not otherwise.

We take it the rule is this: if the finding is general and a judgment is founded upon it, the judgment is conclusive of everything essential to support the judgment; if the finding is special then the judgment is conclusive upon all facts in issue and specially found. If the facts do not support the judgment in law, then it cannot conclude the parties.

The finding in the original suit in Kansas was special as appears by the record, (the judgment following the petition), and does not support the judgment unless you supply facts not set forth in the original declaration and transcript of judgment.

Record, pages 66–81 *inclusive.*

It appears on the face of the facts appearing of record to be an erroneous conclusion of the Court.

It is said that a judgment by default is just as conclusive an adjudication of whatever is necessary to support a judgment as one rendered after answer and contest.

Last Chance Mining Co. v. Tyler Mining Co., 157 *U. S.*, 683–691.

"The essence of estoppel by judgment is that there has been a general determination of a fact * * * a failure to answer is taken as an admission of the truth."

Ibid. p. 691.

Now considering defendant corporation admitted every

word contained in the original declaration in the suit in Kansas, it affords no basis to support an action.

What is a judgment by default; nothing more than a confession or admission in Court by the defendant, of the allegations in the pleadings? If this contract was beyond the scope of the corporation to make, it was beyond the scope of the corporation to ratify. The judgment by default is an attempted ratification of what is incapable of ratification.

In *Board of Com'rs v. Platt*, 79 *Fed.* 567–573, a claim was made in favor of the validity of certain bonds, which the defendant had no power to make, based upon a compromise between the plaintiff and defendant. The court refused to recognize the conclusiveness of the decree because the new agreement could give no life to the invalid act of issuing the bonds. So it seems a judgment by defendant can give no validity to an absolutely unauthorized contract.

Mr. Chief Justice Fuller has said in *Union Pac. Railway v. Chicago &c. Railway Co.* 163 *U. S.* 564, 581. "A contract made by a corporation beyond the scope of its powers express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable by the application of the doctrine of estoppel."

Our contention that an absolutely "ultra vires" contract is not such a "debt or due" as is within the intent of the constitution of Kansas imposing individual liability on the stockholder, and that the judgment may be re-examined, for the purpose of ascertaining whether the "debt or due" falls within the class for which the stockholder is liable, is not in conflict with the law as expounded by this Court in

Whitman v. Oxford Bank, 176 *U. S.* 559.

Hancock Nat. Bank v. Farnum, 176 *U. S.* 640, 643–644.

This question did not arise in those cases nor has it

been suggested, or received any consideration, in the Kansas cases of which the following cases are an example.

Steffins v. Gurney, 61 *Kansas* 292.

Ball v. Reese, 58 *Kansas* 614,

And other cases.

In the case at bar the record shows what was proven. There is no occasion for invoking any rule of assumption or presumption.

The examination of this judgment has been forced upon this Court.

Brownsville v. Loague, 129 *U. S.* 503.

The plaintiff in error, instead of putting in a general finding, introduced the transcript of the original petition, and the recital of the facts found by the Court, to sustain its judgment.

It is difficult for us to distinguish in principle between this case, and the several cases in which this Court has holden that contracts made by a corporation after it has gone into liquidation are void.

Richmond v. Irons, 121 *U. S.* 27–60.

Schrader v. Manufacturer's Nat. Bank, 133 *U. S.* 67.

In the latter case, the power of its officers to bind the corporation by the creation of new obligations had ceased; in the case at bar, they never had such power.

Upon the question, as to the construction of the Kansas constitution, we repeat the words of the late Mr. Justice Lamar:

"The simplest and most obvious interpretation of a constitution if in itself sensible, is the most likely to be that meant by the people in its adoption."

Lake County v. Rollins, 130 *U. S.* 662, 671.

The neglect of the Court below to reopen the case, at the stage of the case when permission to do so was asked, and upon the imperfect and unsatisfactory affidavits furnished, would have been, we suppose, a matter of discretion, if it had been pressed and acted upon. No further affidavits than the two mentioned in the request appear ever to have been filed, and the contents of those do not appear of record, and the Court does not appear to have taken any action in the matter. This Court certainly has no data from which to determine whether the ex parte affidavits support the plaintiff's contention or not.

As the case stands, the evidence does not support the pleadings. The plaintiff in his declaration declares these notes were negotiated by the Loan and Trust Company in the regular course of its business, which averment was not only not proven, but is found to be contrary to the facts appearing in evidence, by the Circuit Judge. This averment is followed by another unproven one alleging an interest of the corporation in the notes.

Records, page 24.

J. S. H. FRINK,

For HIRAM BLAKE *and* WALLACE L. MASON,
Executors, Respondents.

Supreme Court of the United States.

No. 245.—October Term, 1901.

Henry L. Ward, Treasurer, Petitioner, vs. Edward Joslin. } On writ of certiorari to the United States Circuit Court of Appeals for the First Circuit.

[May 19, 1902.]

September 12, 1888, S. S. Hite and Mary L. Hite executed and delivered to one J. E. Ethell their promissory notes in writing of that date, whereby for value received they promised to pay to the order of Ethell on September 12, 1892, the principal sum named in each, with interest thereon at the rate of seven per cent per annum, payable semi-annually, according to the tenor of eight interest coupons bearing interest and attached to each of the notes; and afterwards and before the maturity of the notes, Ethell endorsed, transferred and delivered them to Ward. At that time the Western Investment Loan and Trust Company, a corporation of Kansas, guaranteed in writing the payment of the notes in the following words endorsed on each: "For a valuable consideration the Western Investment Loan and Trust Company hereby guarantees payment of the within obligation, both principal and interest, at maturity." The notes not having been satisfied, Ward brought suit against the Western Investment Loan and Trust Company on the guaranties in the District Court of Smith County, Kansas, and recovered judgment against the company by default; and execution having been issued on the judgment and returned *nulla bona*, Ward brought this action December 15, 1896, against Edward Joslin in the Circuit Court of the United States for the District of New Hampshire to recover of him as a stockholder in said Western Investment Loan and Trust Company, an amount equal to the amount of stock owned by him in said corporation.

The declaration contained two counts. The first alleged the recovery of judgment; the issue of execution and return *nulla bona;* insolvency of the company July 1, 1894, and its want of "property or assets of any kind or value whatever;" that defendant was the owner of one hundred shares of stock; and that, "by reason of the premises and by virtue of the constitution and statutes of the State of Kansas, in such case made and provided, a right of action hath accrued" to plaintiff.

The second count alleged that the loan and trust company "was a corporation chartered and organized for the purpose of transacting a general investment loan and trust business, and under its charter, as it was author-

ized to do, endorsed and guaranteed the payment of notes and obligations negotiated by it;" that these notes and coupons "were in fact negotiated by said corporation, the Western Investment Loan and Trust Company, in the regular course of its business;" that judgment was recovered and execution returned *nulla bona;* "and that by reason of the premises and by virtue of the constitution, statutes and laws of the State of Kansas in such case made and provided," the right of action had accrued.

Among other special matters set up in defense was "that the claim against the Western Investment Loan and Trust Company, upon which a judgment in favor of the plaintiff against said company was founded, was not a due from or debt of said corporation, for which the defendant as a stockholder in said corporation was liable under the constitution and laws of Kansas." And that the Western Investment Loan and Trust Company "never had any authority to endorse the said promissory notes and obligations in the second count in plaintiff's declaration described, or to guarantee the payment of said notes and obligations."

A jury was waived and the cause submitted to the Circuit Court for trial, and the court made and filed its findings of fact and conclusions of law.

After finding that the defendant was a stockholder of one hundred shares of the par value of fifty dollars each in the company in question, the findings thus continued:

"I find as matter of fact, upon the evidence contained in the record and upon the arguments, that Ward's claim against the trust company was upon a guarantee, given upon a valuable consideration, of the payment of certain promissory notes from one third party to another, and was not a guarantee of the payment of securities negotiated by the company.

"I find that the plaintiff brought an action at law in the District Court of Smith County, in the State of Kansas, against the trust company, on December 23, 1892, on these guarantees, by a writ served upon the president of said corporation, and on March, 1893, recovered judgment thereon against the company for $9,787.50, with interest at 12 per cent, and as shown in the record on December 11, 1893, $4,924.75 was paid thereon, and on September 14, 1896, an execution issued for the balance and was returned wholly unsatisfied as shown by the officer's return printed in the record.

"I also find that the trust company was not a railway, religious or charitable corporation, and the business which the corporation was authorized to do was 'to buy and sell personal property, including stocks, bonds, bills, notes, real and chattel mortgages, and choses in action of every kind and description, and to transact the business of a loan and trust company;' that some time after the organization of the company, and before the defendant became a stockholder, the directors thereof resolved 'that the president and secretary of the company be, and they hereby are, authorized to guarantee the payment of all securities negotiated by the company by endorsing upon any such security one of the following forms of a guarantee;' and the resolution of the corporation and the forms of guarantees printed in the record are referred to and made a part of the findings.

"Ascertaining the relations of the parties under the contract, which resulted from the Kansas constitution and the statutes and the defendant's ownership of stock, I find, so far as it is a question of fact, that the dues to be secured by the superadded stockholders' liability were such as were within the reasonable and proper scope of the business as contemplated by the parties, and that a guarantee of this character was not intended by the defendant stockholder, and was not contemplated by the Kansas constitution as a due or a debt within such scope. I also find, so far as it is a fact, that it was not within the scope of the resolution which assumed to authorize the president and secretary to guarantee securities negotiated by the company, and there is no evidence that the defendant stockholder had knowledge that the company was assuming, through its president and secretary, to guarantee the payment of claims not negotiated by itself; and there being no evidence of notice, I find, as a matter of fact, that he was not aware of it.

"I also make a general finding for the defendant."

The rulings of law were stated in the opinion of the court set forth in the record, and reported 100 Fed. Rep. 576.

The Circuit Court ruled that "the relations of the parties are contractual and the term 'dues' in the Kansas constitution ought to be accepted as applying only to claims resulting from the legitimate and contemplated business of the corporation or company, such as arise in respect of transactions within the reasonable scope of the business contemplated; and, as between the creditor and stockholder, they should not be extended to claims which arise from the transaction of unauthorized business."

That "while under section 1192 of the General Statutes of Kansas providing a remedy, a judgment against the corporation may be accepted under proper limitations as conclusive in a proceeding against the stockholder as to the amount and liability of the company upon claims in respect to transactions within the contemplation of the constitution and of the parties to the contract, it should not be accepted as conclusive upon the question of the nature and character of the claims, for the reason that section 1192 is only intended to give a remedy to the creditor in respect to the kind of claims contemplated by the constitution. The judgment on this ground is accepted as conclusive, because it relates to a corporate affair, and because the stockholders' interests are supposed to be represented by the officers of the bank in respect to affairs within the scope of its contemplated, legitimate and authorized transactions;" but the stockholder ought not to be concluded "as to the question whether the foundation and nature of the claim was within the fair intendment of the constitutional provision and the contract between the parties upon the ground of representation, for the reason that such a question is not one which, in the natural and usual course of litigation between the bank and the creditor, would be presented or adjudicated."

That "the contract under the constitution is between the creditor and the stockholder, and the bank, in a proceeding against it by the creditor, to which the stockholder was not a party, would neither be called upon nor be expected or allowed to present such a question for adjudication."

That "the amount of the bank's indebtedness, or its liability, on a question of this kind could and would be put in issue in a suit between the creditor and the corporation; but whether such a due is within the scope of the contract between the creditor and the stockholder under the constitution would not and could not be put in issue in a suit between a creditor and the bank to which the stockholder is not a party."

That "in the original case against the bank by the creditor, the question as to the character of the claim, whether it was one contemplated by the contract between the creditor and the stockholder, was neither presented nor litigated, nor was it in a situation to be presented or litigated; while in the case now under consideration, the question is not whether the claim was an indebtedness or a due for which the bank was liable, which question was litigated and concluded by the judgment, but a question whether it was the kind of a debt or due which the statutory contract between the creditor and stockholder covered or contemplated. This precise question, as has been said, was not presented, could not have been presented, in that case, and therefore is not concluded." That this judgment came within "an exception to the general rule that a judgment against the corporation is conclusive."

Plaintiff moved for a new trial, which was denied, and judgment entered for defendant. The case was taken on error to the United States Circuit Court of Appeals for the First Circuit and the judgment affirmed. 105 Fed. Rep. 224. This writ of certiorari was then issued.

Mr. Chief Justice FULLER delivered the opinion of the Court:

When a case is tried by the court without a jury, its findings on questions of fact are conclusive, although open to the contention that there was no evidence on which they could be based. The question remains whether or not the facts found are sufficient to support the judgment, and rulings to which exceptions are duly preserved may be reviewed.

Plaintiff excepted to the refusal of the court to rule that upon all the evidence plaintiff was entitled to recover as matter of law, and also to the refusal to make other rulings requested, and to the rulings made. The correctness of these rulings was questioned in fifteen errors assigned in the Circuit Court of Appeals, but they need not be recapitulated.

The Circuit Court found as facts that the guaranties on which plaintiff's judgment in the State court was based were not guaranties of the payment of securities negotiated by the company; that the business which the corporation was authorized to do was "to buy and sell personal prop-

erty, including stocks, bonds, bills, notes, real and chattel mortgages, and choses in action of every kind and description, and to transact the business of a loan and trust company;" that the guaranty of these notes was not within the reasonable and proper scope of the business of the company; and that defendant had no notice that the company was assuming to guarantee the payment of claims not negotiated by itself. The court referred to a resolution of the board of directors authorizing the guaranty of securities negotiated by the company, and found this guaranty not within its scope.

This corporation was organized in 1888 under the general laws of Kansas, authorizing the creation of loan and trust companies, by voluntary association as prescribed, with the powers, among others, "to make by-laws, not inconsistent with existing laws, for the management of its property, the regulation of its affairs, and for the transfer of its stock;" and "to enter into any obligation or contract essential to the transaction of its ordinary affairs." The charter of each corporation was required to set forth "the purpose for which it is formed;" and the statute provided that: "No corporation created under the provisions of this act shall employ its stock, means, assets, or other property, directly or indirectly, for any other purpose whatever, than to accomplish the legitimate objects of its creation." Comp. Laws Kan. 1885, p. 210, c. 23, §§ 5, 6, 11, 26.

The purposes for which the corporation was formed were set forth in its charter, and were as found by the Circuit Court. The by-laws provided for a loan committee with power "to discount or purchase bonds, bills, notes and other evidences of debt," but did not embrace the power to guarantee. As before stated, the Circuit Court found that these guaranties were not "within the reasonable and proper scope of the business, as contemplated by the parties."

The purview of the words "loan and trust" does not appear to have been defined by statute or decision in Kansas, but the declaration alleged that this company was organized "for the purpose of transacting a general investment loan and trust business, buying and selling commercial paper, obligations and securities," and it must be assumed that the general rule is applicable that such companies have no implied power to lend their credit, or to bind themselves by accommodation endorsements. They may guarantee paper owned by them, or paper which they negotiate in due course of business and the proceeds of which they receive, but the naked power to guarantee the paper of one third party to another is not incidental to the powers ordinarily exercised by them. The power as exercised here was certainly not "essential to the transaction of its ordinary affairs," nor within "the legitimate objects of its creation." And so far as the question might be resolved by the usage in Kansas, the findings were adverse to plaintiff.

In *Commercial Bank* v. *Provident Institution*, 59 Kan. 361, a judgment against a bank on a guaranty, where the record did not contain any

of the evidence, and there was a general finding for plaintiff, was sustained. The court said that it must be presumed that the guaranty "was executed for a valuable consideration, by the duly authorized officers of the bank, and in due course of business;" and that while "it is true that, in this case, the paper itself does not indicate that the Commercial Bank ever owned it, nevertheless it may have received the proceeds and the guaranty may have been made strictly in the interest of the bank." But the findings in this case take it out of the range of that decision and forbid resort to presumption to make out validity.

We are of opinion that, upon the facts found, the guaranties were given without authority.

The second section of article twelve of the constitution of Kansas provides as follows: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes."

In *Woodworth* v. *Bowles*, 61 Kan. 569, it was held that this constitutional provision was not self-executing, but required legislative action to give it effect.

Section thirty-two of chapter twenty-three of the Compiled Laws of Kansas of 1885 provided that when an execution had been issued against a corporation, and property could not be found on which to levy it, then "execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; . . or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

Section 44: "If any corporation, created under this or any general statute of this State, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; . . ." Section 45: "If any stockholder pay more than his due proportion of any debt of the corporation, he may compel contribution from the other stockholders by action." Section 46: "No stockholder shall be liable to pay debts of the corporation, beyond the amount due on his stock, and an additional amount equal to the stock owned by him." These sections were all carried forward into the Compiled Laws of 1889, with the same chapter and numbers, but that compilation also gives a general number, and the general number of section 32 is 1192. There was no compilation from 1889 to 1897. Sections 32, 44, 45 and 46 reappear in sections 49, 50, 51 and 53 of chapter 66 of the General Statutes of 1897.

The word "dues" thus appears to have been regarded as equivalent to debts or that which is owing. Mr. Justice Story in *United States* v. *Bank*

6 Pet. 29, 36, said, in construing the statute there referred to: "The whole difficulty arises from the different senses in which the word 'due' is used. It is sometimes used to express the mere state of indebtment, and then is an equivalent to owed or owing. And it is sometimes used to express the fact that the debt has become payable."

In *Whitman* v. *Oxford National Bank*, 176 U. S. 559, it was said that: "The word 'dues' is one of general significance, and includes all contractual obligations." Can an obligation which a corporation had no right to incur be a contractual obligation and the basis of "dues," as that word is used in the State constitution? We do not think so. It appears to us that it was not intended by that instrument to impose individual liability on stockholders in respect of risks which they had not undertaken.

One of the grounds on which the doctrine of *ultra vires* rests, is that the interest of the stockholders ought not to be subjected to such risks. Rights of stockholders must be considered as well as those of creditors, and they should not be held directly liable unless such liability was within their contract in legal contemplation.

The rule in this court is that a contract made by a corporation beyond the scope of its powers, expressed or implied, cannot be enforced, or rendered enforcible, by the application of the principle of estoppel. The rule in Kansas seems to be that when the contract has been executed and the corporation has received the benefits of it, the corporation is estopped from questioning its validity, and so in respect of evidences of indebtedness purchased before maturity in good faith and without notice. *Atchison Railroad Company* v. *Fletcher*, 35 Kan. 236; *Town Company* v. *Morris*, 43 Kan. 282; *Alexandria Railroad Company* v. *Johnson*, 58 Kan. 175. But we are not persuaded that if the defense of *ultra vires* had been interposed in the action against this company, and the facts had been found to be as they have been found here, the defense would not have been sustained in the courts of Kansas. If, however, under the State decisions, the corporation would be held estopped from denying the liability, it does not follow that the stockholders must therefore be held liable, if the obligation was in fact incurred without authority. In other words, alleged liabilities incurred without authority, and which do not come within the meaning of the word "dues," as used in the State constitution, cannot be properly treated as brought within the scope of that word, simply because the corporation may be so situated as to be estopped from denying their validity.

Whether in this case the corporation would have been estopped if it had made the defense of *ultra vires*, it did not make it, and judgment went against it. We have held such judgments conclusive in proceedings under the Kansas constitution. *National Bank* v. *Farnham*, 176 U. S. 640. But we did not there hold that it was not open for a stockholder to show that the judgment was not enforcible against him when rendered against

the corporation on a contract beyond its power to make. It must be remembered that in the case before us the right of action accrued, and the action was accordingly averred to have been brought, "by virtue of the constitution and the statutes of the State of Kansas in such case made and provided." We think it was not error to permit the stockholder to go behind the judgment so far as to show, or, at all events, to insist, for the judgment record introduced below disclosed the invalidity of the guaranties, that he was not liable under that constitution and those laws.

In *Schrader* v. *Manufacturing Company*, 133 U. S. 67, it was ruled that although the individual liability of the stockholders of a national bank, as imposed by and expressed in the statute, was for all its contracts, debts and engagements, "that must be restricted in its meaning to such contracts, debts and engagements as have been duly contracted in the ordinary course of its business;" and that a judgment recovered against the bank in a suit commenced some years after it went into liquidation "was not binding on the stockholders in the sense that it could not be re-examined."

In *Brownsville* v. *League*, 129 U. S. 493, it was held that "if a petitioner for a writ of mandamus to compel the levy of a tax to pay a debt evidenced by a judgment recovered on coupons of municipal bonds is obliged to go behind the judgment in order to obtain his remedy, and it appears that the bonds were void, and that the municipality was without power to tax to pay them, the principle of *res judicata* does not apply upon the question of issuing the writ." The petition in that case set up the judgment and averred that "petitioner's only remedy to enforce the collection of his judgments is that awarded by the act authorizing the issue of the bonds from which the coupons were detached upon which said judgments were obtained." And we held that as the relator was compelled to go behind the judgments as money judgments merely, "to obtain the remedy pertaining to the bonds, the court cannot decline to take cognizance of the fact that the bonds are utterly void and that no such remedy exists."

As then the provision of the constitution of the State of Kansas, if properly construed, imposes the liability in question only in respect of corporate indebtedness lawfully incurred, that is to say, in respect of dues resulting in regular course of business and in the exercise of powers possessed, plaintiff cannot recover in this action by virtue of the constitution and laws of the State, on the facts found, and the judgment must be affirmed.

As to the denial of the motion for new trial it is not within our province to interfere with the discretion of the Circuit Court.

Judgment affirmed.

Mr. Justice GRAY did not hear the argument or take any part in the decision.